FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 12 1907
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 588.

THE ILLINOIS CENTRAL RAILROAD COMPANY, et al.,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION,
Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Argument of ED. BAXTER,
Of Counsel for Appellants.

FOSTER, WEBB & PARKER, NASHVILLE

The L. & N. R. R. has purchased since February, 1904, about 100 locomotives at an increased cost of not less than $250,000 for the same class of locomotives.

Compton, Trans., Vol. I, pp. 171, 172, 178.

The price of locomotives has advanced 25 to 30 per cent since February, 1904.

Compton, Trans., Vol. I, p. 178.

The following have been some of the increases on the N. O. & N. E. R. R. since February, 1904:

Coal	6 per cent
Trackmen	10 to 15 per cent
Through freight conductors	8 per cent
Woodworkers in shops	8 per cent
Painters	4 per cent
Cleaners	10 per cent
Laborers	14 per cent

Steele, Ex. A A, Trans., Vol. I, p. 378.

L

The Mere Fact that There Has Been an Increase in the Gross Earnings of a Railway is No Indication of its Financial Prosperity.

His Honor, Judge Speer, said:

"It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross and net earnings have steadily

increased." . . . "It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but in the nature of things, this is not to be expected of any business."

138 Fed. Rep., pp. 765, 766, Tift v. Southern Ry. et al.

It is manifest that a mere increase in the annual gross earnings of a railroad is no indication of its financial prosperity; because, if its operating expenses have also increased so that they equal the gross earnings, the railroad and its equipment have been subjected to a year's wear and tear, in the service of the public, without the company deriving any profit at all from its operation.

It is also manifest that a mere increase in the annual net earnings of a railroad is no indication of an improvement in its financial condition; because though the annual net earnings may have increased, yet if they have not increased in the same proportion as the gross earnings have increased, the railroad and its equpiment have been subjected to a year's wear and tear in the carriage for the public of a largely increased traffic but at a materially reduced ratio of profit.

To illustrate: Suppose that during the fiscal year 1903 the gross earnings of a certain railroad were $5,000,000, and the net earnings were $1,500,000. In that case the net earnings would amount to 30 per cent of the gross earnings, which is about the average normal relation which the railway net earnings bear to gross earnings in the territory involved in this complaint.

Statistics of Rys. in U. S., 1903, p. 95.
Statistics of Rys. in U. S., 1904, p. 97.

Suppose that during the fiscal year 1904 the gross earnings of said railroad were $6,000,000, and that the net earnings were $1,600,000. Now, if the percentage of net earnings to gross earnings had been the same in 1904 as it was in 1903 (i. e., 30 per cent), the net earnings in 1904 would have been $1,800,000, whereas they were only $1,600,000; and therefore though both the gross and net earnings increased in the year 1904, the company's net earnings in 1904 were $200,000 less than they would have been if the per cent of net to gross earnings had been as great in 1904 as it was in 1903.

Or, to state it differently, it will be seen that while in the year 1904 the gross earnings increased $1,000,000 the net earnings increased only $100,000; and therefore, the percentage which the increase in net earnings bore to the increase in gross earnings was only 10 per cent; whereas the average normal per cent of net to gross earnings is, as shown above, 30 per cent.

In other words, in order to compare the profitableness of one year's operation with another, the comparison must be made not between the amount of gross earnings or the amount of net earnings, but between the percentage which the increase in net earnings bears to the increase in gross earnings.

LI.

Railroads May Lawfully Graduate their Charges in Proportion to the Prosperity of the Industries Whose Products they Transport.

His Honor, Judge Speer, said:

"They (the railroads) have no right to graduate their charges in proportion to the prosperity which accrues to industries whose products they transport."

138 Fed. Rep., p. 767, Tift v. Southern Ry.

The position taken by His Honor is directly opposed to that taken by the Commission, In Re Proposed Advances in Freight Rates (9 I. C. Rep., pp. 386, 439), where the Commission said:

"Where reductions have been made by reason of commercial depression it is difficult to see why corresponding advances may not with propriety occur when that depression is relieved."

In the majority report and opinion in the Tift case, 10 I. C. Rep., p. 561, the Commission said:

"After the advance in rates from Georgia points, June 22, 1903, there was a material falling off in the shipments of lumber to the West, or points on and north of the Ohio River."

The fact that there had been such a falling off in shipments was one of the main grounds relied upon by the majority for holding that said increase was unreasonable.

The railways defendant in the Tift case insisted before the Commission that said falling off in shipments was only temporary; that it was due to a temporary stoppage of the manufacture of railroad cars and equipment (which had consumed from 60 to 80 per cent of the Georgia lumber shipped to the West); and that as soon as the Presidential election should be over and business conditions become settled, the manufacture of railroad cars and equipment would be resumed, and the demand for lumber restored.

The supplemental affidavits in the Tift case, taken in the U. S. Circuit Court, after that case had been decided by the Commission, showed that the defendants were right in their prediction; and thereby one of the main objections waged against said so-called advance by the majority of the Commission in the Tift case was entirely removed.

His Honor, Judge Speer, in effect conceded that the prediction of the defendants was fulfilled, because in speaking of the change in the circumstances and conditions which occurred soon after the decision of that case by the Commission, he said:

"For well-known causes of a political nature, there had been a great and enthusiastic revival in the business, enterprise, and confidence of the country. A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advanced rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants and received as evidence."

138 Fed. Rep., p. 766, Tift v. Southern Ry. et al.

In the petition filed before the Commission in the case of Central Yellow Pine Association v. Illinois Central Railroad Company et al., the order in which is sought to be enforced in the present litigation, complainants averred that the increase of 2 cents per hundred pounds complained of was "highly injurious to the business of complainants and others similarly situated," and rendered "practically inaccessible their available markets."

Trans., Vol. I, p. 8.

It is thus seen that the contention made before the Commission in the Central Yellow Pine Association case, as to the effect of the increase, was substantially the same as that made in the Tift case, but the depositions taken in the Circuit Court on behalf of the appellants show conclusively that the contention made before the Commission as to the effect of the increase is unsound, and that the lumber business in the Mississippi territory has, notwithstanding the increase, undergone a wonderful revival; that the mills are not able to supply the demand; and that prices of lumber are today higher than they have been since 1891, which is as far back as the statistics of prices comprised in the record in this case go.

Mr. Enochs, whose testimony has been hereinbefore cited, is a prominent lumberman who has been engaged in the lumber business ever since 1873. He testifies that the present prices of lumber are higher than he has ever known them to be in the past; and that the present demand for lumber is greater than he has ever known it to be.

Trans., Vol. I, p. 406.

LII.

In Considering the Reasonableness of the Increase, the Enormous Expenditures which Defendants Have Been Forced to Make in Recent Years Should be Given Due Weight.

In the majority report and opinion of the Commission in the Tift case, 10 I. C. Rep., p. 573, the Commission said:

"There was a long period of business depression in the South during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper or first class condition. When that period passed away, unusual expenditures were required for new engines, new car equipment, the replacing of worn-out rails and in other ways necessary to put the roads in proper condition and enable them to handle their largely increased business."

And upon the same subject, His Honor, Judge Speer, said:

"Where formerly asthmatic engines, attached to unsafe and noisome trains, through the solitudes of an impoverished country, like a wounded snake, dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the

admiration kindles and the pulse leaps as the limited express laden with its human freight glances by on its mission of progress and civilization."

138 Fed. Rep., p. 767, Tift v. Southern Ry. et al.

When it is remembered that the millions of dollars required to make said improvements and repairs have been deducted from gross earnings, and thereby reduced the net earnings which otherwise would have gone to the railroad stockholders, it will be seen that said improvements and repairs, which have contributed so much to the prosperity of the country, were made at the sole expense of the stockholders, who have no possible means of reimbursing themselves, except by such slight increases in their rates, as will, to some extent, restore the normal percentage which net earnings should always bear to gross earnings, and yet not interfere with the free and profitable movement of the traffic of the country.

LIII.

THE "FINDINGS OF FACT" MADE BY THE COMMISSION IN THE CASE AT BAR ARE NOT CONCLUSIVE ON THIS COURT.

"Findings of fact" are not even *prima facie* evidence, unless the inquiry made by the Commission be conducted "on a proper basis."

162 U. S., p. 235, T. & P. Ry. v. I. C. C.

"Findings of fact" must be made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded."

162 U. S., p. 238, T. & P. Ry. v. I. C. C.

175 U. S., p. 676, L. & N. R. R. v. Behlmer.

"Findings of fact" must be made "in the light of all facts duly alleged and supported by competent evidence."

162 U. S., p. 238, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.

If the Commission exclude facts and circumstances that ought to have been considered, or if it "unduly restricts its inquiries," the "findings of fact" are not *prima facie* evidence.

162 U. S., pp. 235, 239, T. & P. Ry. v. I. C. C.

The inquiry made by the Commission in the case at bar was not conducted "on a proper basis;" it was not made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded;" and it was "unduly restricted in its scope;" as herein before shown in this argument.

The fact that the Court is authorized to "hear and determine the matter as a court of equity" necessarily implies that the Court is not concluded by the findings or conclusions of the Commission.

162 U. S., p. 239, T. & P. Ry. v. I. C. C.
168 U. S., p. 175, I. C. C. v. Ala. Midland Ry.
50 Fed. Rep., 304, I. C. C. v. A. T. S. F. R. Co.
49 Fed. Rep., 180, I. C. C. v. L. V. R. Co.
37 Fed. Rep., pp. 613, 614, K. & I. Bridge Co. v. L. & N. R. R.

There is power in the Circuit Court and the Circuit Court of Appeals 'to consider and apply the evidence," and in this Court to review their decisions.

168 U. S., p. 174, I. C. C. v. Ala Midland Ry.

LIV.

The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as Much Weight as the General Verdict of a Jury.

It has been said by this Court that the question whether a rate is reasonable, is a question of "fact."

162 U. S., 196, C. N. O. & T. P. Ry. v. I. C. C.
162 U. S., 219, 227, 235, 238, T. & P. Ry. v. I. C. C.
175 U. S., 676, L. & N. R. R. v. Behlmer.
181 U. S., 28, E. T. V. & G. Ry. v. I. C. C.

It is manifest, however, that the Court did not intend to say that the question whether a rate is reasonable is one of "pure fact;" and that all the Court intended to say was that it is a question of "fact mixed with law."

Some questions involve "pure matters of fact, unmixed with any element of law;" while other questions involve matters of fact in which are mixed certain elements of law; and the latter are known as "questions of mixed law and fact."

Bliss' Code Pldg, 208.

Thus, the question of fraud is one necessarily compounded of fact and of law.

123 U. S., 432, 433, Jewell v. Knight.

And so the questions of "negligence" and 'reasonableness," are mixed questions of law and fact.

88 Fed. Rep., p. 448, Dooley v. Pease.

It has been said by this Court that "the general verdict

of a jury *concludes* mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the courts upon a question of law."

112 U. S., p. 674, Martinton v. Fairbanks.
9 Wall., p. 127, Norris v. Jackson.

But a finding of facts made by the Commission does not "conclude" either pure questions of fact, or mixed questions of law and fact; because the Act to Regulate Commerce expressly enacts that a finding of facts made by the Commission shall be only *prima facie* evidence.

37 Fed. Rep., 613, K. & I. Bridge Co. v. L. & N. R. R.
62 Fed. Rep., 693, Shinkle, Wilson & Kreis Co. v. L. & N. R. R.

In other words, while the general verdict of a jury *"concludes"* a mixed question of law and fact, a finding made by the Commission is only *prima facie* evidence of such matters of "pure fact," as may be involved in the question.

There is a substantial reason why Congress did not permit a finding by the Commission to have the conclusive effect of a general verdict by a jury on a mixed question of law and fact.

Every mixed question of law and fact necessarily involves matter of law; and every litigant has the right to have all matters of law decided *by the Court.*

In the case of a general verdict by a jury either party may readily obtain the judgment of the Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four modes:

First: Either party may request the Court to give the jury proper instructions as to the rules and principles of law by which they are to be governed in their determination of the question.

Second: Or either party may request the Court to inform the jury hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegation in the pleading.

Third: Or either party may request the Court to instruct the jury to find the facts specially; and then the Court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties.

Fourth: Or either party may present to the Court their propositions of law, and require the Court to rule on them.

1 Head (Tenn.) 616, 617, Whirley v. Whiteman.
9 Wall., 128, 129, Norris v. Jackson.
52 Mo., 207, 209, Fourth National Bank v. Heuschen.
19 Am. and Eng. Enc. of Law, p. 633.

But in proceedings before the Interstate Commission it is impossible for a party to ever obtain the judgment of any court upon the matter of law involved in a mixed question of law and fact; if the finding made by the Commission on that question be given as conclusive effect as is given to the general verdict of a jury.

LV.

The Finding Made by the Commission on a Mixed Question of Law and Fact is Not Entitled to as Much Weight as the General Finding of a Court.

Under the fourth section of the act of March 3, 1865, when the parties waive a jury, a general finding of the Court upon the facts has the same effect as the general verdict of a jury; and where the general finding of a Court includes a mixed question of law and fact it is as conclusive as the general verdict of a jury, except so far as the matter of law involved in the question may be saved by some exception which the party has taken to the ruling of the Court on the law.

9 Wall., 127, 128, Norris v. Jackson.

12 Wall., 297, Miller v. Life Ins. Co.

But, where the finding of a trial court is general, either party may readily obtain the judgment of the Appellate Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four ways:

First: Either party may object to the admission or exclusion of evidence and require the trial Court to rule on the objection.

Second: Or either party may present to the trial Court his propositions of law and require the Court to rule on them.

Third: Or either party may ask for definite ruling by the Court as to whether all the evidence is sufficient in law to warrant a finding in his favor.

Fourth: Or either party may get the trial court to make a special finding, which raises the legal propositions.

9 Wall., 128, 129, Norris v. Jackson.
12 Wall., 297, Miller v. Life Ins. Co.
112 U. S., 672, 673, Martinton v. Fairbanks.

When the verdict of a jury is special, or the finding of facts by a court is special, such a verdict, or finding, "raises the legal propositions" involved in a mixed question of law and fact, and the power of review by this Court extends "to the determination of the sufficiency of the facts found to support the judgment."

9 Wall., 128, 129, Norris v. Jackson.
12 Wall., 297, Miller v. Life Ins. Co.
112 U. S., 672, 673, Martinton v. Fairbanks.

It will be seen, therefore, that whether the verdict of a jury or the finding of a Court be general or special, either party can compel the separation of matter of law from matter of fact involved in a mixed question of law and fact, and demand the judgment of the Court upon so much of the question as consists of matter of law. But, according to the contention of appellee, the finding of the Commission on the mixed question of law and fact as to the reasonableness of a rate is conclusive on the matter of law involved in the question, and neither this nor any other Court can review the judgment of the Commission on such matter of law.

To paraphrase the language of this Court in C. M., etc., Ry. v. Tompkins, 176 U. S., p. 172, when we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast

amount of property is beyond the protecting principle which insures to every one else the judgment of the *courts* upon all questions of *law*, is one which cannot be tolerated.

Respectfully submitted,

ED. BAXTER,
Counsel for Appellants.

TABLE OF CONTENTS.

	PAGE
Statement of Case	1
Proceedings before the Commission—The Petition	2
Proceedings before the Commission continued—Answers	8
Proceedings before the Interstate Commerce Commission continued	41
Proceedings in the Circuit Court	18
Assignment of Errors	18
The Question Involved	23
The Majority of the Commission Erred in holding that the Rates from Mississippi Territory to the Ohio River are Unreasonable	25
The Rates from Points in Mississippi Territory to the Ohio River are Reasonably Low, because they are Controlled by Competition	28
The Rates from Points in Mississippi Territory to the Ohio River are Reasonably Low, because the Average Rate per Ton per Mile Yielded by said Rates is Lower than the Majority of Other Rates per Ton per Mile on Lumber	35
The Rates from Mississippi Points to Ohio River Points and Points Beyond are Reasonably Low, because they are Lower than the Rates on Lumber between many other Points for Similar Distances	57
The Rates from Mississippi Territory to the Ohio River are Reasonably Low, because it is to the Interest of the Appellants that they should be so	61
The Rates from Mississippi Territory are Reasonable, because the Lumber Interests in Alabama, Mississippi and Louisiana have Prospered under the Rate Adjustment Made by Appellants	63

PAGE

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, because the Percentage of Increase has been Greater in the Price of Lumber than in the Rates on Lumber 64

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, because the Transportation of Lumber is Exceptionally Expensive to the Carrier 67

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, because Appellants' Operating Expenses have Materially Increased in Recent Years 69

The Rates from Mississippi Territory to the Ohio River are, in the Opinion of Competent Experts, Reasonably Low .. 75

The Increase of 2 Cents per Hundred Pounds, Made Effective April 15, 1903, was Justified by the Change in Competitive Conditions 77

The Increase of 2 Cents per Hundred Pounds, Made Effective April 15, 1903, was Justified by the Change in the Condition of the Lumber Market 79

The Increase of 2 Cents per Hundred Pounds, Made Effective April 15, 1903, or June 23, 1903, was Justified, because the Present Rates (Including said Increase) are Less than the Rates that were in Force Prior to the Depression in the Lumber Market 85

The Increase of 2 Cents per Hundred Pounds, Made Effective April 15, 1903, was Justified, because the Percentage of Increase has been Greater in the Operating Expenses of the Intermediate Roads which Receive said Increase than in the Rates on Lumber 93

The Increase in Appellants' Operating Expenses is not Due Alone to Increased Mileage 97

Permanent Improvements and Equipment are Properly Chargeable to Operating Expenses 100

Lumber was not Selected by Appellants to Meet the Entire Increase in Their Operating Expenses 104

The Fact that Appellants' Net Earnings, as well as Their Gross Earnings, have Increased is not Material 107

PAGE

It was Proper for the Intermediate Roads Leading North from Jackson and Meridian to the Ohio River to Increase Their Proportions by Increasing the Total Through Rates 112

The Rate on Lumber May be Somewhat Remunerative and yet be Unreasonably Low 117

Neither the Commission nor the Court had Jurisdiction to Determine the Reasonableness of the Proportions of a Through Rate 120

The Proportions of the Originating Roads are not Voluntarily Allowed to Them by the Intermediate Roads 122

The Articles of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association do not Violate the Anti-Trust Act 125

There was no Agreement Between Competing Lines to Make the So-called Advance of 2 Cents per Hundred Pounds on Lumber 130

There was no Concert of Action or Previous Understanding Between the Competing Lines in Regard to said So-called Advance 131

Even if there had been "Concert of Action" or "Previous Understanding," it would not have Rendered Appellants' Action Unlawful 131

It is not Unlawful for Competing Carriers to Confer Together on Matters of Common Interest 133

No Contract Violates the Anti-Trust Act Unless its Direct and Immediate Effect is a Restraint upon Interstate Commerce 141

Appellants did not Promulgate the Increase of Rates on the Same Day 144

There has been no Suppression of Competition in this Case.. 146

The Increase of 2 Cents per Hundred Pounds is the Outcome of Competition 148

Neither the Commission nor the Circuit Court had any Jurisdiction in this Case, of the Anti-Trust Act 149

PAGE

The Error of Judge Speer in Holding that the Purpose of the Southeastern Freight Association is "to Fix and Control Rates" 154

Neither the Southeastern Freight Association nor the Southeastern Mississippi Valley Association has any authority to Issue a "Firman" or "Ukase" 155

Appellants have not Violated the Pooling Section of the Interstate Commerce Law 156

We have Never Insisted that Because the Members of said Associations could Withdraw from the Association Agreement at any Time, it was not a Combination in Restraint of Trade 157

Appellants have Never Claimed the Right to Arbitrarily Increase Freight Rates 159

The Commission Erred in Finding that the Average Rate per ton per mile on Lumber Originating on the Illinois Central Railroad in 1903 was Greater than the Average, 5.91 mills, on all Traffic 160

Since the Testimony in this Case was Concluded Before the Commission in February, 1904, Conditions Surrounding the Lumber Traffic have Undergone a Material Change for the Better 161

The Movement of Lumber to Points on and North of the Ohio River has Increased 166

The Price of Lumber has Materially Advanced Since the Testimony Before the Commission was Taken 170

There has been a Marked Increase in the Price of Lumber Purchased by Railroad Companies for their own use since the Testimony Before the Commission was Concluded 172

In Addition to the Increase in Cost of Lumber there has, since 1903, been a Marked Increase in Cost of Operating Railroads in Other Respects 176

The Mere Fact that there has been an Increase in the Gross Earnings of a Railway is no Indication of its Financial Prosperity 177

PAGE

Railroads may Lawfully Graduate Their Charges in Proportion to the Prosperity of the Industries whose Products they Transport 180

In Considering the Reasonableness of the Increase, the Enormous Expenditures which Defendants have been Forced to Make in Recent Years Should be Given Due Weight 183

The "Findings of Fact" Made by the Commission in the Case at Bar are not Conclusive on this Court 184

The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as much Weight as the General Verdict of a Jury 186

The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as much Weight as the General Finding of a Court 189

TABLE OF AUTHORITIES.

	Cited in Brief
19 Am. & Eng. Enc. of Law	188
11 Ann. Rep., I. C. C., 1897	121
13 Ann. Rep., I. C. C., 1899	132, 134, 136 137, 139, 143 147, 149, 150
Bliss' Code Pldg	186
Cattle Raisers' Assn. v. Ft. W. & D. C. Ry. Co. et al., 7 I. C. Rep.	153
Cattle Raisers' Assn. v. M. K. & T. Ry. et al., 11 I. C. Rep.	60
C. M. & St. P. Ry. v. Tompkins, 176 U. S.	190
C. N. O. & T. P. Ry. v. I. C. C., 162 U. S.	28, 186
Cotting v. K. C. Stockyards Co., 183 U. S.	59, 111
C. Y. P. Assn. v. I. C. R. R. Co. et al., 10 I. C. Rep.	30
C. Y. P. Assn. v. V. S. & P. R. Co. et al., 10 I. C. Rep.	29, 30
Dooley v. Pease, 88 Fed. Rep.	186
E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S.	26, 186
Fourth National Bank v. Heuschen, 52 Mo.	188
Holmes v. Southern Railway Co., 8 I. C. Rep.	77
Hopkins v. U. S., 171 U. S.	142
I. C. C. v. Ala. Mid. Ry. Co., 168 U. S.	185
I. C. C. v. A. T. & S. F. R. Co., 50 Fed. Rep.	185
I. C. C. v. L. & N. R. Co., 190 U. S.	154
I. C. C. v. L. V. R. Co., 49 Fed. Rep.	185
I. C. C. v. Southern Ky. Co., 117 Fed. Rep.; affirmed 122 Fed. Rep.	59
I. C. C. v. W. & A. R. Co., 93 Fed. Rep	75
Jewell v. Knight, 123 U. S.	186

CITED IN BRIEF

K. & I. Bridge Co. v. L. & N. R. Co., 37 Fed. Rep..... 185, 187

Kinnavey v. Terminal Asso., 81 Fed. Rep..... 27

L. & N. R. Co. v. Behlmer, 175 U. S. 184, 185, 186

Martinton v. Fairbanks, 112 U. S 187, 190

Mayor &c. of Wichita v. C. R. I. & P. Ry. Co. et al., 9 I. C. Rep..... ..... 53, 54

Miller v. Life Ins. Co., 12 Wall..... .... 189, 190

National Wholesale Lumber Dealers' Assn. v. N. & W. Ry., 9 I. C. Rep..... 48, 49, 60

Norris v. Jackson, 9 Wall..... ....187, 188, 189 190

Preliminary Report on Income Acccunt... ... . 105, 107

Re Proposed Advances in Freight Rates, 9 I. C. Rep..84, 85, 91, 92 111

Ricketts Smith et al. v. Midland Ry. Co. et al., 9 Ry. & Can. Traf. Cas..... 61

Shinkle, Wilson & Kreis. Co. v. L. & N. R. Co., 62 Fed. Rep. 187

Smith & Forrest v. L. & N. W. Ry. Co. et al. XI Ry. & Can. Traf. Cas. 94

Smyth et al. v. Ames et al., 169 U. S..... 118, 119

Sprigg v. B. & O. R. Co., 8 I. C. Rep... .... 152, 153

Spring V. Waterworks v. San Francisco, 124 Fed. Rep..... 115

Statistics of Railways in U. S..... 178

T. & P. Ry. v. I. C. C., 162 U. S..... .....184, 185, 186

T. & P. Ry. v. Mudd, 202 U. S..... 27

Tift v. Southern Ry. Co. et al., 10 I. C. Rep.....31, 32,44,100 104, 111, 180 183

Tift v. Southern Ry. Co. et al., 138 Fed. Rep.....154, 155, 156 157, 159, 178 180, 181, 184

CITED IN BRIEF

U. P. R. R. Co. v. U. S., 99 U. S. 101, 103

U. S. Census, 1900, Vol. IX 63, 64

24 U. S. Stat. at Large 26, 146

34 U. S. Stat. at Large 122

U. S. Joint Traffic Assn., 171 U. S. 125, 127, 128 142

U. S. v. Trans-Missouri Frt. Assn., 166 U. S. 125, 126, 127 141, 144, 151

Van Patten v. C. M. & St. P. Ry. Co., 81 Fed. Rep. 27

Whirley v. Whiteman, 1 Head (Tenn.) 188

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 588.

THE ILLINOIS CENTRAL RAILROAD COMPANY, et al.,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION,
Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Argument of ED. BAXTER,
Of Counsel for Appellants.

STATEMENT OF CASE.

The above entitled case was originated by a petition filed before the Interstate Commerce Commission by the Central Yellow Pine Association against the appellants, the Illinois Central Railroad Company and others.

A majority of said Commission sustained said petition, and made a certain order against the appellants.

Said appellants, conceiving said order to be illegal, de-

clined to obey it; and said Commission filed a petition in the Circuit Court of the United States for the Eastern District of Louisiana to enforce said order.

Said Court decreed the enforcement of said order, and appellants appealed to this Court.

I.

Proceedings Before the Commission—The Petition.

The Central Yellow Pine Association, a voluntary association composed of the fellowing persons, firms and corporations, viz: Amos Kent Lumber & Brick Co., Kentwood, La.; Banner Lumber Co., Kentwood, La.; Sutherland-Innes Co., Hanson City, La.; C. W. Robinson Lumber Co., New Orleans, La.; Eastman-Gardner & Co., Laurel, Miss.; Camp & Hinton Co., Lumberton, Miss.; A. S. Hinton & Co., Lumberton, Miss.; R. W. Hinton, Lumberton, Miss.; Eureka Lumber Co., Eastabuchie, Miss.; A. W. Stevens Lumber Co., Chatawa, Miss.; Tipton Lumber Co., Lacey Lumber Co., Lacey, Miss.; Pine Grove Lumber Co., E. A. Watson Lumber Co., Champion Lumber Co., Orvisburg, Miss.; Pearl River Lumber Co., Brookhaven, Miss.; Fernwood Lumber Co., Enochs Bros., Fernwood, Miss.; Butterfield Lumber Co., Norfield, Miss.; Marbury Lumber Co., Marbury, Ala.; Henderson Lumber Company, Sanford, Ala.; Henderson & Boyd, Enterprise, Ala.; T. H. Johnson & Co., Birmingham, Ala.; Cedar Creek Mill Co., Brewton, Ala.; Blacksher-Miller Lumber Co., Brewton, Ala.; Horseshoe Lumber Co., River Falls, Ala.; Lathrop-Hatton Lumber Co., Riverside, Ala.; Lathrop Lumber Co., Birmingham, Ala.; Yellow Pine Lumber Co., Yellow Pine, Ala.; Twin Tree Lumber Co., Maplesville, Ala.; Stewart Lumber Co., Brinson, Ga., and J. J. White, McComb

City, Miss., filed a petition before the Interstate Commerce Commission against the Illinois Central Railroad Company, and many other companies, whose lines form through routes for the interstate transportation of yellow pine lumber produced in Alabama, Mississippi and Louisiana east of the Mississippi River to points on the Ohio River and beyond.

Said petition, after setting forth that the complainants therein are engaged in the business of manufacturing and shipping yellow pine lumber from the States of Mississippi, Alabama, and that part of Louisiana east of the Mississippi River, and that their chief markets are located in the several States north of Cairo, Ill., averred:

1. That the charges for the transportation of yellow pine lumber, effective prior to April 15, 1903, were higher than the reasonable and just value of the service would allow, being the result of increases from time to time over rates previously in effect.

2. That the appellant railroad companies falsely assuming that the yellow pine industry was enjoying an era of unexampled prosperity, and that its manufactured products were continually increasing in value, and claiming the right to share in their assumed prosperity, conceived the plan and purpose of laying an advance of 2 cents and more per hundred pounds in the freight rate from all points in the yellow pine region to points on and north of the Ohio River; and that as the result of an unlawful agreement between said appellants, notice was given that effective March 1, 1903, previously existing rates would be advanced 2 cents, 3 cents, 4 cents and 5 cents per hundred pounds.

3. That by reason of unfulfilled contracts based on the

previously existing rates the advance was postponed to April 15, 1903, with the exception that the appellant, the Louisville & Nashville Railroad Company made said advance effective on June 22, 1903.

4. That said advance of 2 cents, 3 cents, 4 cents and 5 cents per hundred pounds accrued to the appellants entirely, and not to their railway connections north of the Ohio River.

5. That by reason of the restoration of rates in effect prior to April 15, 1903, by the lumber-carrying roads west of the Mississippi River, mills west of the river had an undue advantage over those east of the river.

6. That said increase of April 15, 1903, is unjust, unreasonable, arbitrary, unlawful and discriminatory, and injurious to the business of complainants.

7. That said increase imposes upon yellow pine lumber an excessive burden, out of line with and far more grievous than is sustained by other products and commodities of like weight, cost of carriage, value of product, service, and all all other conditions considered.

8. That the annual average output of yellow pine lumber of the mills belonging to and operated by the members of complainant association approximates over 1,500,000 feet per annum, of the value at the mills of about $6,000,000, not less than three-fourths of which is shipped into the territory on and north of the Ohio River, where it comes in competition with similar lumber from other pine-producing States, and is directly and injuriously affected by the increased rates.

9. That the increase in rates represents $400,000 to $800,000 per annum in additional freights on lumber shipped by complainants to said territory.

10. That the increased rates are unjust, unreasonable, excessive, discriminatory and arbitrary, and contrary to the provisions of the Act to Regulate Commerce and amendments thereto, in this:

(a) That the rates in effect prior to April 15, 1903, yielded more than the carriers were justly entitled to receive, and that under said rates yellow pine lumber was an exceedingly profitable commodity to the carriers.

(b) That under said previously existing rates yellow pine lumber yielded the most or nearly the most profit to the railroad of any freight originating in the Southern territory, value, tonnage and cost of handling considered; that the value being small, the tonnage being very great, the cost of handling being comparatively small, and being practically indestructible, it could be transported in any kind of cars the railroad might have empty.

(c) That the average freight on yellow pine lumber from complainants' mills to points of destination amounts in the aggregate to a sum equaling or nearly equaling the value of the products at the point of shipment.

(d) That low grade lumber, constituting about 33 1-3 per cent of the entire product of the mills, would not be able to compete with other low grade lumber at the advanced rates.

(e) That said previous rate on yellow pine lumber, as

is the present rate, was greater per ton per mile than on coal, pig iron, cement and other like products, value, weight and cost of handling considered, and yielded an ample profit to the carrier.

(f) That in the shipment of yellow pine lumber on platform or coal cars, shippers are required to equip the cars with standards, braces and strips of high grade lumber at their own expense, and pay freight on the increased weight caused by said equipment.

(g) That the railroads transporting yellow pine lumber from the yellow pine regions of Arkansas, and Trans-Mississippi Louisiana, not only charge lower freight rates to their patrons, but allow them a rebate in the shape of so-called tap-line divisions to logging roads owned by them (i. e., the patrons) and used to bring logs from the woods to their saw mills, thus placing the complainants at a double disadvantage in at least all markets reached by Cairo, Ill., as a basing point.

(h) That said advance in rates is an unjust and unreasonable burden upon complainants and the public, in that during the fiscal year 1902-1903, said appellant companies earned an unusually and unreasonably large net profit in their business and upon the actual capital invested therein.

11. That while the prices of yellow pine lumber have remained practically stationary for a year prior to the filing of the petition before the Commission, the cost of production has largely increased; and that it is not practicable to add the amount of the increase in freight rate to the selling price.

12. That said increase placed complainants' product at an unfair disadvantage with other woods and lumber in competing markets, and was unnecessary to enable appellants to earn a reasonable return upon their investments.

13. That the increased expenses of the appellants were due to lax and unbusinesslike methods, and to abnormal conditions, and that their net revenues now yield a largely increased return upon the value of their investments.

It is proper to here explain that though at the date of the filing of the petition before the Commission the rates upon yellow pine lumber from Arkansas, and Trans-Mississippi Louisiana, to the territory of consumption on and north of the Ohio River were 2 cents lower than the rates on yellow pine lumber from producing points east of the Mississippi River, such condition was not due to any fault of appellants; and it was of only temporary duration. The lines west of the Mississippi River severally published that they would advance their respective rates 2 cents per hundred pounds, effective April 15, 1903, which was the same date as that upon which the lines east of the river severally proposed to make effective a corresponding advance.

It so happened that certain injunction proceedings prevented the lines east of the river from making their respective advances effective on that date, and the lines west of the river withdrew their proposed advances and restored their former rates. As soon as said injunction proceedings would permit it to be done, the lines east of the river severally made their respective advances effective; but the lines west of the river did not make their respective advances effective until August 15, 1903. Since that date, however, an advance (of 2 cents per hundred pounds) has been in force from both sides of the river.

Miller, Trans., Vol. I, pp. 152, 153.

II.

Proceedings Before the Commission Continued—Answers.

The Mobile & Ohio Railroad Company, the Mobile, Jackson & Kansas City Railroad Company, and the Gulf & Ship Island Railroad Company, defendants to said petition, filed separate answers thereto.

A joint and several answer to said petition was filed by the Illinois Central Railroad Company, the Southern Railway Company, the New Orleans & Northeastern Railroad Company, the Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Alabama & Vicksburg Railway Company, and the Louisville & Nashville Railroad Company.

The answers may be summed up as follows:

1. It was denied that the charges for the transportation of yellow pine lumber, effective prior to April 15, 1903, were higher than the reasonable and just value of the service would allow.

2. It was averred that the improved market conditions prior to April 15, 1903, resulted in a great increase in the price of lumber, which fully justified the increase in rates, in view of the increased cost of operating appellants' railroads, and in view of the fact that the lumber traffic, considering its character and volume, was not yielding its proper proportion of the revenue required by the appellants to meet their expenses.

3. It was averred that the lumber business was never in such good shape, or on such a sound basis.

4. It was denied that the increase in rates upon yellow pine lumber was the result of any unlawful agreement or compact in restraint of interstate trade; but, on the contrary, it was averred that the increase was made as the result of the independent action of each of the appellants, and that no appellant was in any wise controlled by any agreement with any competing railroad company.

5. It was denied that the Southeastern Mississippi Valley Association (to which association specific reference was made in the petition in connection with the alleged illegality of the rates under the Sherman Anti-Trust Law), was organized or is maintained under agreements or for purposes which constitute an illegal combination in restraint of interstate trade, or for the fostering of monopoly in destruction of fair competition among carriers engaged in interstate trade.

6. It was insisted that the Interstate Commerce Commission was without jurisdiction to inquire into the legality of the Southeastern Mississippi Valley Association.

7. It was admitted that notice was first given to make the advance in rates effective March 1, 1903, and that by reason of unfulfilled contracts based on the previously existing rates, the advance was postponed to April 15, 1903, with the exception that the appellants, the Louisville & Nashville Railroad Company, made said advance effective on June 22, 1903.

8. It was averred that while in some instances there

were apparent increases in the rates amounting to 3, 4 and 5 cents per hundred pounds over the rates in effect prior to April 15, 1903, said apparent increases were caused by the erroneous construction of some of said previous rates; and in the reconstruction of said rates effective April 15, 1903, after said errors were corrected, the actual advance in said rates was only 2 cents per hundred pounds, the same as the amount of the general advance in other rates, which did not require correction.

9. In response to the allegation that the advance of 2 cents went entirely to the appellants whose lines lay south of the Ohio River, it was insisted that the Interstate Commerce Commission had no jurisdiction to determine what are proper divisions of through rates, such divisions being a matter of contract between the connecting carriers.

10. It was denied that the increase of 2 cents per hundred pounds is unjust, unreasonable, arbitrary, unlawful or discriminatory, or injurious to the business of complainants.

11. It was denied that said increase imposes upon yellow pine lumber an excessive burden, out of line with that which is sustained by other products and commodities, when weight, cost of carriage, value of product, service, and all other conditions are considered.

12. It was averred that complainants had already increased their prices on lumber so as to cover, and in some cases more than cover the advance in lumber rates, and that the advance in rates had not diminished the movement of lumber.

13. It was denied that the increased rates are unjust,

unreasonable, excessive, discriminatory or arbitrary, or contrary to the provisions of the Act to Regulate Commerce or amendments thereto.

(a) It was denied that under the rates in effect prior to April 15, 1903, yellow pine lumber was an exceedingly profitable commodity to the carriers, though it was admitted that under said previously existing rates, lumber was carried at some profit; i. e., over the mere cost of its own movement.

(b) It was denied that under said previously existing rates yellow pine lumber yielded the most profit to the railroad of any freight originating in Southern territory, value, tonnage and cost of handling considered.

(c) It was denied that the average freight on yellow pine lumber from complainants' mills to points of destination amounts in the aggregate to a sum equaling or nearly equaling the value of the lumber at the point of shipment.

(d) It was denied that a large portion of the yellow pine product of complainants' mills is of low grade; and it was averred that their product is nearly all high grade lumber, such as flooring, ceiling, etc.

It was averred that because of the high price of high grade lumber, the low grades of lumber were in great demand, and it was denied that complainants would not be able to compete in the same markets with low grade lumber from other producing sections.

(e) It was denied that the rate on lumber previous to the advance was greater per ton per mile than on coal, pig

iron, cement or other like products, value, weight and cost of handling considered, or that said previous rate yielded an ample profit to the carriers; and it was denied that the present rate on lumber is greater per ton per mile than on coal, pig iron, cement, or other like products, value, weight and cost of handling considered.

It was averred that the comparison made in the petition between the rates on lumber, and those on coal and pig iron is unfair, irrelevant and misleading, considering the difference in value and character of the traffic.

(f) It was admitted that in the shipment of yellow pine lumber on platform or coal cars shippers are required to equip cars with standards, braces and strips at their own expense, and pay the freight on the increased weight caused by said equipment; but it was averred that said cars are furnished as a general rule at the request of shippers, who prefer them on account of the fact that it is cheaper to load them than to load box cars; that flat cars are hauled to the mills empty, and consequently the rates charged for the transportation of lumber on flat cars represent a double service; that a large part of the flat cars furnished to the mills belong to foreign railroads, on which the appellants are compelled to pay a per diem of 20 cents per day, even when moving south empty; and that shippers of other articles than lumber which need similar protection, are required to equip cars at their own expense.

It was further averred that formerly the carriers charged 3 cents per hundred pounds more for lumber carried on flat cars than for lumber carried in box cars, because they were compelled to haul flat cars to the mills empty;

and because they were compelled, in the case of long lumber, to furnish two or more flat cars, one of which is known as an idler.

(g) In answer to the allegations of the petition that the railroads west of the Mississippi River were charging lower rates than the roads east of the said river, and that said railroads west of the said river were allowing rebates in the shape of tap-line divisions, appellants disclaimed all responsibility for, or participation in, such practices.

(h) It was denied that the advance in rates is an unjust or unreasonable burden upon complainants and the public, when considered in connection with the return earned by the carriers upon the actual cost of construction and equipment of their respective railroads, or in connection with the capitalization of said railroads.

14. While it was admitted that the prices of yellow pine lumber remained practically stationary for a year prior to the filing of the petition before the Commission, it was averred that the market value of said lumber from 1897 to January 1, 1902, increased not less than 60 per cent, and that complainants had already increased their prices so as to cover and, in some cases, more than cover the increase in rate.

It was further averred that said increase would allow complainants and other manufacturers a reasonable return upon the money invested in their respective industries, and that the increased rate has not diminished the movement of the traffic.

15. It was denied that said increase placed complain-

ants' product at an unfair disadvantage with other woods and lumber in competing markets, or that said increase was unnecessary to enable the appellants to earn a reasonable return upon their investments.

It was averred that lumber had not been singled out to bear the whole burden of increased rates, but that the same had been equitably and fairly distributed among the shippers of various commodities.

16. It was averred that appellants had been doing a larger volume of business at greatly increased expense, and with proportionately less net revenue; and it was denied that such result was due to lax or unbusinesslike methods in the handling of their traffic, as charged by complainants.

III.

Proceedings Before the Interstate Commerce Commission Continued.

A large amount of testimony was taken on behalf of the appellants before the Commission, in support of the following general propositions:

First: That the former rates had been accepted by them, not because they were just and reasonably high, but because they were the highest that could be obtained in competition with yellow pine lumber produced in Arkansas, and sold in territory on and north of the Ohio River.

Second: That the rates formerly charged were made lower than they might reasonably and justly have been

made, because of a depression in the lumber market on and north of the Ohio River, which existed for a number of years, and which rendered it necessary for appellants to accept at that time unreasonably low rates in order to enable yellow pine lumber from the Mississippi producing district to compete at the prices then prevailing.

Third: That the earliest rates that were in force on lumber from the Mississippi District to the territory on and north of the Ohio River, and some of which prevailed for several years, were higher, even under the competition referred to, than are the present rates, including said advance of 2 cents per hundred pounds.

Fourth: That after the period of depression had passed, and the lumber market began to improve, the rates from the Mississippi district were gradually advanced as the price of lumber advanced; and when the lines west of the river severally advanced their rates to Cairo, Ill. (the pivotal point in the rate adjustment), to the extent of 2 cents per hundred pounds, appellants were enabled to make a similar advance from the Mississippi district to Cairo.

Fifth: That the abnormal increase in the operating expenses of railways rendered an advance necessary; not only in the lumber rates, but in the rates upon many other commodities.

Sixth: That the advanced rates from the Mississippi district are just and reasonable.

The Commission however held:

First: That where an advance is made in rates which

have been long maintained, and the evidence shows that the traffic affected is large and important, the advance will be held to be unjust, unless it is satisfactorily explained.

Trans., Vol. II, pp. 994, 999.

Second: That the abnormal increase in operating expenses of the appellant railways was due to the charging of amounts expended for permanent improvements and betterments to operating expenses; and that the amount of such expenditures made by the appellants in a few years, preceding and including the year of advance in rates, was extraordinary, and would probably not be required again for a long period of time.

Trans., Vol. II, p. 996.

Third: That, admitting the rates to have been reduced on account of depression in the lumber trade, the carriers would secure sufficient participation in returning prosperity by the resultant enlargement of their business, without restoring rates to the figures which were in effect prior to the period of depression.

Trans., Vol. II, pp. 987, 988.

Fourth: That upon the whole the advance of 2 cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio River crossings) was not warranted under all the facts in evidence, and that the resultant increased rate is unreasonable and unjust.

Trans., Vol. II, p. 999.

On February 7, 1905, the Commission issued its order declaring the advance of 2 cents per one hundred pounds established by the Louisville & Nashville Railroad Company

on June 22, 1903, and by the other appellants on April 15, 1903, to be excessive, unreasonable and unjust; and ordered the carriers to cease and desist on or before April 1, 1905, from further maintaining or enforcing said advance.

Trans., Vol. II, pp. 1001, 1002.

The appellants being advised that said order was not a "lawful order," declined to obey it.

The alleged illegality of the advance of 2 cents per hundred pounds under the Sherman Anti-Trust Law, was made quite prominent by counsel for complainant in the proceedings before the Commission.

While the Commission held that it was without jurisdiction to administer the anti-trust act, it nevertheless held that it was competent for it to consider the so-called joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, which was alleged to be the result of that action; and it is evident upon reading the report and opinion, that the Commission was perhaps influenced to a greater extent in the conclusions which it reached upon the case as a whole by the supposed suppression of competition, than by any other single element which entered into its consideration of the case.

Trans., Vol. II, pp. 993, 994.

IV.

Proceedings in the Circuit Court.

The Commission filed a bill in the Circuit Court in this case to enforce its order.

The appellants answered the same, denying the matters of equity therein alleged.

Additional testimony was taken on behalf of complainant and defendants in said Court.

The Circuit Court, without delivering a written opinion, approved the order of the Commission, and decreed its enforcement.

The appellants appealed to this Court.

V.

ASSIGNMENT OF ERRORS.

The Illinois Central Railroad Company, the Gulf & Ship Island Railroad Company, the Southern Railway Company, the Mobile & Ohio Railroad Company, the New Orleans & Northeastern Railroad Company, the Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Alabama & Vicksburg Railway Company, and the Louisville & Nashville Railroad Company, say that in the said decree rendered by said Circuit Court, and in the record and proceedings in said Court, in this cause, there is manifest error in this, to-wit:

FIRST.

Said Circuit Court erred in decreeing "That the order made by the Interstate Commerce Commission, and drawn into question in this cause, be in all things affirmed and made the order of said Court," said order of said Commission being "That the advance of two (2c) cents per one hundred pounds established by the defendant, the Louisville & Nashville Railroad Company, on June 22, 1903, and by the other defendants herein on April 15, 1903, over rates previously in effect for the transportation of lumber in carloads from shipping points on defendants' respective lines in the State of Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly called and known as Ohio River points, which said advance has since been maintained and enforced by the defendants, was and is excessive, unreasonable and unjust, and in violation of the provisions of the Act to Regulate Commerce; and that the rates and charges resulting from the said advance (which said rates are more specifically referred to in said report and opinion) are also excessive, unreasonable and unjust, and in violation of the provisions of the Act to Regulate Commerce;" because said advance in rates, as well as the rates and charges resulting from said advance are not excessive, unreasonable or unjust, nor are they in violation of any of the provisions of the Act to Regulate Commerce or of the amendments thereto.

SECOND.

Said Circuit Court erred in decreeing "That injunction issue restraining and enjoining the defendants, each and all of them, from further disobedience to said order, and from maintaining or enforcing an advance of two cents per one

hundred pounds established by the defendant, the Louisville & Nashville Railroad Company, on June 22, 1903, and by the other defendants herein on April 15, 1903, over rates previously in effect for the transportation of lumber in carloads from shipping points on defendants' respective lines in the State of Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River commonly called and known as Ohio River crossings, and from further charging, for the transportation of lumber as aforesaid, the rates resulting from said advance;" because no ground was shown either in the pleadings or in the proof to justify the issuance of an injunction enjoining said respondents jointly and severally, to discontinue or to desist from maintaining or enforcing the said advance in rates made effective by the defendants on the dates aforesaid, to shipments of lumber in carloads from points in Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama to said points on the Ohio River.

THIRD.

Said Circuit Court erred in decreeing that the costs of the suit be taxed against and be paid by the defendants; because said costs should have been awarded against the complainant.

FOURTH.

Said Circuit Court erred in decreeing, in effect, that said advance of two cents per hundred pounds in the rates on lumber in carloads charged by the defendants from shipping points in Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama, to the said points on the Ohio River, made effective on June 22, 1903, and

April 15, 1903, was made under circumstances and conditions which eliminated all competition between defendants, whereas the exact reverse is the truth of the case.

FIFTH.

Said Circuit Court erred in not dismissing said bill of complaint; because, the Court exercised the legislative function of making a rate contrary to the provisions of the Constitution of the United States, which provides that legislative, executive and judicial functions shall be kept separate.

SIXTH.

Said Circuit Court erred in decreeing, in effect, that the advance of 2 cents per 100 pounds established by the defendant, the Louisville & Nashville Railroad Company, June 22, 1903, and by the other defendants herein on April 15, 1903, over rates previously in effect for the transportation of lumber in carloads from shipping points on defendants' respective lines in the States of Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly called and known as Ohio River points, is excessive, unreasonable and unjust; because, the charges made on shipments of lumber from points in Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, when shipments are destined to points north of said river, are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine.

SEVENTH.

Said Circuit Court of the United States erred in decreeing that injunction issue enjoining said defendants from maintaining or enforcing said advance, in so far as it applied to points basing on Ohio River destinations; because, the Interstate Commerce Commission only found that said advance in rates, made effective on June 22, 1903, and April 15, 1903, from different points in Louisiana east of the Mississippi River, and in the States of Mississippi and Alabama to Ohio River crossings was unreasonable and unjust; and it did not find that the rates from said shipping points to points basing on Ohio River crossings were either unreasonable or unjust; nor was there any evidence before either the Commission or the Court that would have justified such finding.

WHEREFORE, the above named defendants in the above entitled cause, viz: the Illinois Central Railroad Company, the Gulf & Ship Island Railroad Company, the Southern Railway Company, the Mobile & Ohio Railroad Company, the New Orleans & Northeastern Railroad Company, the Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Alabama & Vicksburg Railway Company and the Louisville & Nashville Railroad Company, pray that said decree of said Circuit Court be reversed, and that said Circuit Court be ordered to enter a decree dismissing the original bill filed in the above entitled cause in said Court by the said Interstate Commerce Commission against said defendants.

VI.

ARGUMENT.

THE QUESTION INVOLVED.

The real question involved in this case is as to the reasonableness of a so-called advance of 2 cents per hundred pounds in the proportions allowed to what are known as the "intermediate" roads, as their shares of rates on lumber from shipping points in Mississippi, Alabama and Louisiana east of the Mississippi River, to the Ohio River crossings.

As hereinbefore shown, in Section II, the advance of 2 cents was severally made effective on April 15, 1903, by the appellants other than the Louisville & Nashville Railroad Company. It was not made effective by the latter company until June 22, 1903.

The following extracts from the majority report and opinion of the Commission in this case will explain what is meant by "intermediate" roads:

"The through rates to interior points beyond the Ohio River in Central Freight Association territory, are made up of the full local rates of the roads north of the Ohio as the proportions of those roads, and whatever is left of the through rates, as the proportion of the roads south of the Ohio."

Trans., Vol. II, p. 963.

"There are divisions of the rates south of (the) Ohio between what are termed the 'originating' roads' on which

the lumber is principally manufactured and the roads intermediate between those originating roads and the Ohio River. The principal originating roads named in the testimony are the Gulf & Ship Island road, extending from Gulf Port on the Gulf of Mexico to Jackson, Miss., and the New Orleans & Northeastern road extending from New Orleans to Meridian, Miss. The Illinois Central road connects with the Gulf & Ship Island road at Jackson, and on lumber received from the Gulf & Ship Island road at that point the Illinois Central allows that road a division of 7 cents out of the rate to the Ohio River. This allowance commenced in 1899, and by contract between the roads is to continue ten years. At Meridian the Mobile & Ohio road connects with the New Orleans & Northeastern road, and on lumber received from that road allows it 6 cents out of the rate to the Ohio. The Alabama Great Southern road and its connections also pay at Meridian to the originating road a division of 6 cents."

"The divisions allowed the originating roads are large in proportion to the length of the hauls made by them, and in proportion to the balances of the rates left for the intermediate roads."

Trans., Vol. II, pp. 964, 965.

"As the 2 cents advance goes entirely to the roads continuing the transportation on to the Ohio, and none of it to the originating roads, the inference is that the advance was made solely with a view of increasing the proportions of the former roads."

Trans., Vol. II, p. 995.

VII.

The Majority of the Commission Erred in Holding that the Rates from Mississippi Territory to the Ohio River are Unreasonable.

In said report and opinion, the majority of the Commission said:

"Our conclusion on the whole is that the advance, April 15, 1903, of 2 cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio River crossings) was not warranted under all the facts in evidence, and that the resultant increased rate is unreasonable and unjust."

Trans., Vol. II, p. 999.

On the contrary, appellants aver and insist that said so-called advance of 2 cents per hundred pounds in said rates was fully warranted by the facts, circumstances and conditions disclosed by the testimony; and that the rates then put in force are reasonable and just, and are not in violation of any law.

In its report and opinion in this case the majority of the Commission said:

"The question of the reasonableness in this sense of a rate on a single article of traffic is one of almost insuperable difficulty."

Trans., Vol. II, p. 990.

The majority of the Commission further said:

"It is plain that until there be fixed, either by legislative

enactment or judicial interpretation, some definite basis for the valuation of railroad property and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions" (i. e., questions as to the reasonableness of the rates).

Trans., Vol. II, p. 991.

The first section of the original Act to Regulate Commerce enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

The second section provides for that class of cases where a difference in rates constitutes an unjust discrimination.

The third section provides for that class of cases where a difference in rates constitutes an undue preference.

The fourth section provides for that class of cases where a difference in rates constitutes a greater charge for a shorter than for a longer haul, etc., under substantially similar circumstances and conditions.

The first section provides for that class of cases where the question involved is whether certain rates are reasonable and just, in and of themselves, even though they do not constitute an unjust discrimination, nor an undue preference, nor a greater charge for a shorter than for a longer distance.

The phrase "just and reasonable in and of themselves" was used by this Court in the case of E. T., V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 18, 19.

There is no difficulty in understanding what Congress

meant in saying that rates must be "just and reasonable" in and of themselves; but unfortunately Congress has failed to enumerate directly the elements which should be taken into consideration in determining the reasonableness of rates "in and of themselves."

In the case of Van Patten v. C. M. & St. P. Ry. Co. (81 Fed. Rep., p. 545) it was held by District Judge Shiras that the Interstate Commerce Act provides for and prescribes indirectly a standard, by comparison with which it may be determined whether a given rate is or is not to be deemed unreasonable (i. e., in and of itself) within the meaning of the act; and that standard, he says, is the rate adopted, printed and kept posted, as required by the statute, by those engaged in the business, and subject to the effect of free competition. See also Kinnavey v. Terminal Asso., 81 Fed. Rep., p. 802, and T. & P. Ry. v. Mudd, 202 U. S., 242. Under holding of Judge Shiras, the majority of the Commission erred in this case in deciding that said so-called advance of 2 cents per hundred pounds, made effective April 15, 1903, makes the through rates from Mississippi territory to the Ohio River unreasonably high in and of themselves; because there is no question but that said through rates were "adopted, printed and kept posted" by the respective appellants as required by the Act to Regulate Commerce.

Even if it be true that the question of the reasonableness in and of itself of a rate on a single article of traffic " is one of almost insuperable difficulty," as stated by a majority of the Commission, appellants are advised and insist that such difficulty, however great, gives no authority to the Commission to solve it by mere arbitrary action. The question of the right of the Commission, under the original

act, to fix future rates, by arbitrary action, was distinctly denied by this Court in the case of C. N. O. & T. P. Ry. v. I. C. C., 162 U. S., p. 197.

VIII.

The Rates from Points in Mississippi Territory to the Ohio River are Reasonably Low, Because they are Controlled by Competition.

The testimony shows that the rates on lumber from the shipping points in Alabama, Mississippi and Louisiana east of the Mississippi River are materially and substantially affected, and, in fact, controlled by competition; and therefore, they are reasonably low.

In the majority report and opinion in this case, it was said:

"The lumber producing districts which are concerned in the matters involved in this case may be divided into—

"First: Territory west of the Mississippi, composed of Louisiana west of that river, and Arkansas and Texas;

"Second: Louisiana east of the river, Mississppi and part of Alabama, and,

"Third: Georgia, Florida and part of Alabama, called Southeastern territory.

"The lumber men in each of these districts compete in the sale of their product in the same markets, which are principally in the territory on and north of the Ohio River,

and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, known as 'Central Freight Association territory.'"

Trans., Vol. II, p. 962.

The Commission in its majority report and opinion further said:

"At Cairo traffic from the mills in a large portion of the lumber producing district, west as well as east of the Mississippi River, meets or converges en route to destination, the line to Cairo being the short line from the greater part of those districts. The rates to the other Ohio River crossings, Evansville, Louisville and Cincinnati, are said to be based on Cairo; that is, they bear a fixed relation to the Cairo rate, being higher by certain amounts and being correspondingly advanced or reduced as the Cairo rate is advanced or reduced."

Trans., Vol. II, p. 963.

In the case of Central Yellow Pine Association v. V. S. & P. R. Co. et al., it was stated as follows:

"Large quantities of yellow pine lumber are manufactured in the States of Arkansas, Louisiana and Texas. This lumber is similar to that produced in Mississippi and Alabama and competes with it in Northern markets. The territory mainly referred to in this proceeding is what is known as Central Freight Association territory, being, roughly speaking, the section lying north of the Ohio River and between the Mississippi upon the west and the line running through Buffalo and Pittsburg upon the east. As we learn from the testimony in this case, and also from that taken in other cases, recently heard by the Commission, rates from both

sides of the Mississippi River into this territory upon yellow pine lumber are the same. *This relation was established after much competition and long controversy* for the purpose of admitting lumber from both sections upon terms of equality." . . . "The method of manufacturing and marketing this lumber is essentially identical in all parts of the South."

10 I. C. Rep., p. 195, C. Y. P. Assn v. V. S. & P. R. Co. et al.

The principal rail lines which compete for the carriage of lumber from the territory west of the Mississippi (composed of West Louisiana, Arkansas and Texas) are "the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain & Southern Railway Company and the Kansas City Southern Railway Company."

10 I. C. Rep., pp. 194, 195, C. Y. P. Assn. v. V. S. & P. R. Co. et al.

The principal rail lines which compete for the carriage of lumber from the territory composed of East Louisiana, Misisissippi and part of Alabama are the Illinois Central Railroad Company; the Gulf & Ship Island Railroad Company; the Southern Railway Company; the Mobile & Ohio Railroad Company; the New Orleans & Northeastern Railroad Company; the Alabama Great Southern Railroad Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Alabama & Vicksburg Railway Company; the Louisville & Nashville Railroad Company, and the Mobile, Jackson & Kansas City Railroad Company.

10 I. C. Rep., 504, C. Y. P. Assn. v. I. C. R. R. Co. et al.

The principal rail lines which compete for the carriage of lumber from the territory composed of Georgia, Florida and part of Alabama, called Southeastern territory, are the Southern Railway Company; Atlantic Coast Line Railroad Company; Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; Seaboard Air Line Railway; Central of Georgia Railway Company; Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company.

10 I. C. Rep., p. 548, Tift v. Southern Ry. Co. et al.

It will be seen that the Southern Railway Company and the Louisville & Nashville Railroad Company are the only carriers that participate in the carriage of lumber from more than one of said territories; and that neither of those companies participates in the carriage of lumber from the territory west of the Mississippi River.

It will be seen from the foregoing extracts from the opinions of the Commission quoted above, that the method of manufacturing and marketing lumber is essentially identical in all parts of the South; that the lumber from all three of the territories, above described, is destined to the same markets north of the Ohio River; that at Cairo, traffic from the mills in a large portion of the lumber producing districts, west as well as east of the Mississippi River, meets or converges en route to destination at Cairo, the line to Cairo being the short line from the greater part of those districts; and it will also be seen that the rates to the Ohio River crossings other than Cairo (i. e., Evansville, Louisville and Cincinnati) are based on Cairo, or have a fixed relation to the Cairo rate, being higher by certain amounts, and being correspondingly advanced or reduced as the Cairo

rate is advanced or reduced. It is also manifest from said extracts that the carriers from that territory which has the lowest average distance to Cairo can fix the rate to Cairo, and the rate so fixed must be met by the carriers from the other two territories or they must retire from the lumber traffic.

In the majority report and opinion in the case of H. H. Tift et al. v. Southern Ry. Co. et al., it was said:

"The distances to Cairo from lumber shipping points in Arkansas, Louisiana and Mississippi are less than from Georgia shipping points. The following appear to be approximately correct as average distances to Cairo, to-wit:

"From Arkansas.....365 miles
"From Mississippi.....412 miles
"From Louisiana (taking Sibley as a central shipping point) .....499 miles
"And from the principal Georgia shipping points.739 miles

10 I. C. Rep., p. 561, Tift v. Southern Ry. Co. et al.

In the majority report and opinion in this case, Trans., Vol. II, p. 964, it is shown that the rate from Louisiana, Mississippi and Alabama to Cairo is 16 cents, which is the same as the rate from Arkansas points to Cairo. It is manifest that the appellants would not carry lumber from Mississippi to Cairo, an average distance of 412 miles, and from Louisiana to Cairo, an average distance of 499 miles, for the same rate as is charged by the carriers from Arkansas, for a distance of only 365 miles, unless appellants were forced to do so by effective and controlling competition.

Appellants having thus shown that competition from

Arkansas controls the rates to Cairo, and the Commission having stated in the extracts above quoted that the rates to the other Ohio River crossings, viz., Evansville, Louisville and Cincinnati, have a fixed relation to the Cairo rate, and must be correspondingly advanced or reduced as the Cairo rate is advanced or reduced, it is manifest that the same competition which controls the rate to Cairo equally controls the rates to Evansville, Louisville and Cincinnati.

Lumber produced in Mississippi territory competes, north of the Ohio River, with white pine lumber produced in Wisconsin, Michigan, etc., and with fir and spruce lumber produced on the Pacific coast.

Lumber produced in Mississippi territory may be shipped via all rail to and beyond the Ohio River; and it may also be shipped via all rail, or rail and water, to New York and other Northeastern cities.

The rates charged by the appellants on lumber from Mississippi territory to and beyond the Ohio River are not only controlled by the rates which are accepted by rival lines carrying lumber to the same territory from other lumber producing districts, but the rates from the Mississippi mills to and beyond the Ohio River are controlled by the rates which are accepted by rival lines from the same mills to New York and the Northeast.

Diagram A on the next succeeding page shows the various lumber producing districts; the lumber consuming districts, and the principal lines which compete for the carriage of lumber from said lumber producing districts to said lumber consuming districts.

We anticipate that appellees will insist that by reason of some of appellants being members of the Southeastern Mississippi Valley Association, and by reason of the Southern Railway and certain other companies which participated in the increase in lumber rates from Georgia territory being members of the Southeastern Freight Association, there is no real bona fide competition existing; but we will hereinafter show that the articles of the Southeastern Mississippi Valley Association and the articles of the Southeastern Freight Association (unlike those of the Trans-Missouri Freight Association and the Joint Traffic Association) do not suppress competition, nor destroy individual action.

The appellant, the Gulf & Ship Island Railroad Company, is not a member of the Southeastern Mississippi Valley Association.

The Southern Railway Company is the only appellant which is a member of the Southeastern Freight Association.

None of the lines which carry lumber to points on and north of the Ohio River from the white pine district, comprising Wisconsin, Michigan, etc.; and none of the lines which carry lumber from the fir and spruce districts of the Pacific coast are members either of the Southeastern Mississippi Valley Association or of the Southeastern Freight Association.

We insist that it was error of law for the Commission and the Courts to refuse to give to the fact that said rates are controlled by competition, the legal value to which it is entitled.

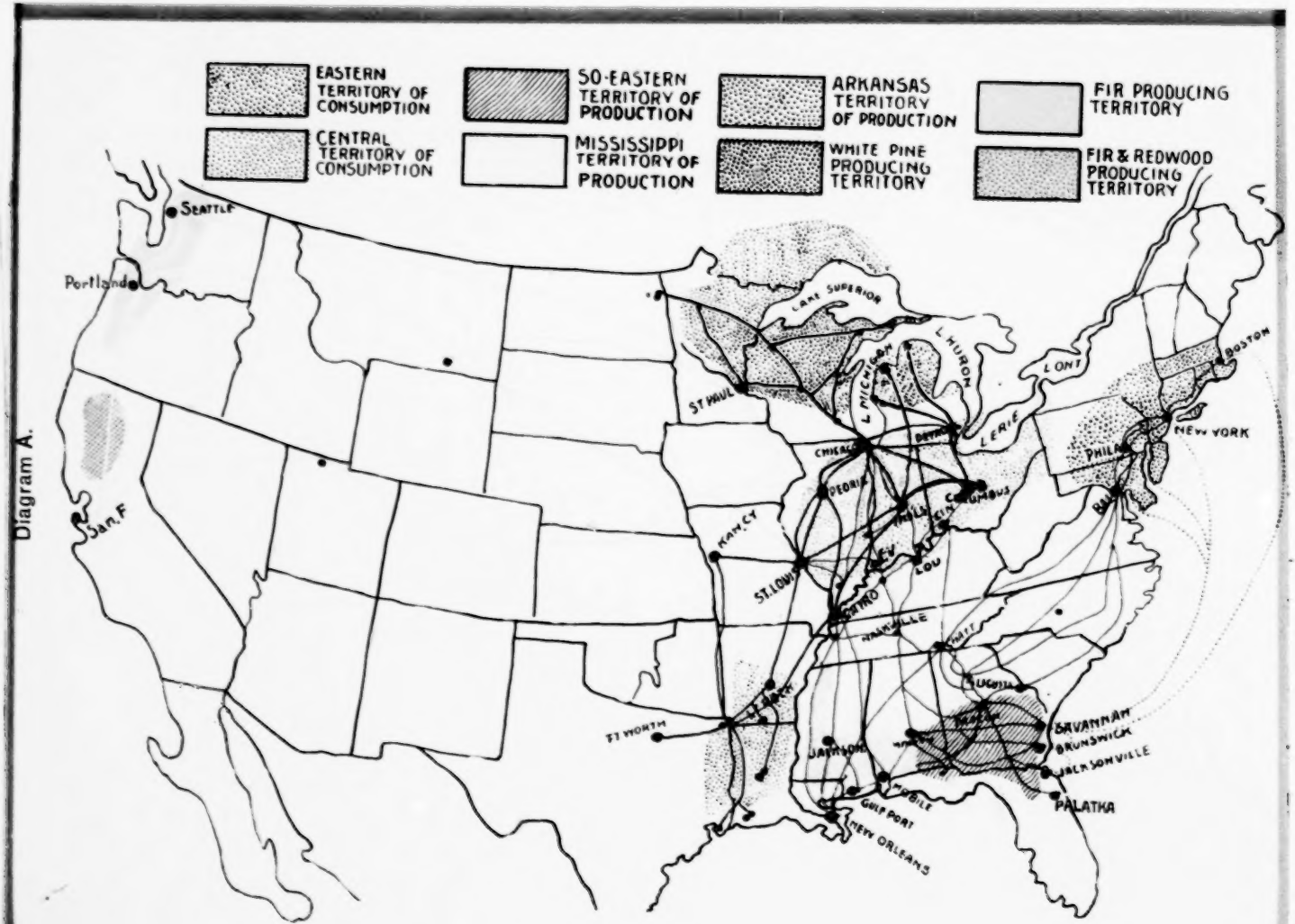
EASTERN TERRITORY OF CONSUMPTION
CENTRAL TERRITORY OF CONSUMPTION
SO-EASTERN TERRITORY OF PRODUCTION
MISSISSIDPI TERRITORY OF PRODUCTION
ARKANSAS TERRITORY OF PRODUCTION
WHITE PINE PRODUCING TERRITORY
FIR PRODUCING TERRITORY
FIR & REDWOOD PRODUCING TERRITORY
SEATTLE
Portland
San.F
LAKE SUPERIOR
L MICHIGAN
L HURON
L ONT
L ERIE
ST PAUL
CHICAGO
DETROIT
PEORIA
BOSTON
NEW YORK
PHILA
BALT
COLUMBUS
KANS CY
ST LOUIS
LOU
MEMPHIS
NASHVILLE
ATLANTA
AUGUSTA
FT WORTH
JACKSON
SAVANNAH
BRUNSWICK
JACKSONVILLE
PALATKA
MOBILE
GULF PORT
NEW ORLEANS

Diagram A.

IX.

The Rates from Points in Mississippi Territory to the Ohio River are Reasonably Low, Because the Average Rate Per Ton Per Mile Yielded by Said Rates is Lower than the Majority of Other Rates Per Ton Per Mile on Lumber.

While it has been hereinbefore generally explained by references to the report and opinion of the Commission that the adjustment of rates on lumber from Mississippi territory and Georgia territory to points on and north of the Ohio River has been influenced by the competition from Arkansas, it may be well before proceeding further to give some illustrations showing how the matter works out in actual practice.

The lines north of the Ohio River publish their tariffs of rates on lumber, in which tariffs are shown the rates from Cairo, Evansville, Louisville and Cincinnati to thousands of points in the territory on and north of the Ohio River. The rates shown in said tariffs, though known as "arbitraries," in constructing rates from points south of the Ohio River to points north of that river, are, in fact, the local rates of the companies publishing the same. Said rates are exacted by the Northern lines on all lumber tendered them by their Southern and Southwestern connections at the Ohio River, regardless of the competitive circumstances and conditions which may surround the shipment as a through shipment, from point of origin in the South, or Southwest, to final destination in the North. In other words, none of the burden of equalizing the commercial or competitive condi-

tions as between the Arkansas lumber producing territory, the Mississippi lumber producing territory, or the Georgia lumber producing territory is assumed by any of the carriers leading northward from the Ohio River.

By reason of the fact that the yellow pine producing territory in Arkansas extends into a higher latitude than the lumber producing sections of Mississippi, Alabama and Georgia, the distance from said Arkansas territory to the Ohio River at Cairo, Ill., is materially less than the distance from the yellow pine producing sections of Mississippi, Alabama and Georgia, either to Cairo, Ill., or to any other of the Ohio River crossings. The lines from Arkansas therefore have always been able to maintain to Cairo a rate very much lower than the rates prevailing at the same time from Mississippi, Alabama and Georgia to other Ohio River crossings; and the lines extending from Mississippi, Alabama and Georgia to Cairo have been compelled at that point to meet the low rate from Arkansas. It has not, however, been found necessary in meeting the competition existing at Cairo to lower the rates from Mississippi, Alabama and Georgia to Evansville, Louisville and Cincinnati correspondingly, since the lines from Arkansas do not reach said latter points, and since said latter points are too remote from Arkansas territory to be subject to the influences which exist at Cairo.

From Louisiana, Mississippi and Alabama, the present rate on lumber destined to stop at Cairo is 16 cents (the same as from Arkansas to Cairo), while from Louisiana, Mississippi and Alabama, the rate on lumber destined to stop at Evansville is 22 cents; at Louisville, 21 cents, and at Cincinnati, 23 cents.

Mr. Green testifies:

"When we made that adjustment (i. e., the adjustment which made the rates to Cairo on lumber lower than the rates to Evansville, Louisville and Cincinnati), we departed from the relative basis of rates which had obtained for many years, not only as to lumber, but all other classes of traffic, and which obtains today, with the exception of lumber to the various Ohio River crossings—Cairo, Louisville, Cincinnati," etc.

Trans., Vol. II, p. 224.

It will be noted that the advantage of Cairo over Evansville, Louisville and Cincinnati ranges from 5 to 7 cents per hundred pounds; and the result of this advantage in rates south of the Ohio River is, that to practically all points of destination in Ohio, Indiana and Illinois, the rate from Mississippi, Alabama or Arkansas to Cairo, added to the local rates of the northern lines from Cairo to points of destination, produces the lowest total through rates that can be formed via any Ohio River crossing.

It would, of course, have been possible for the lines from Mississippi and Georgia territory, in their endeavor to meet the Arkansas competition, to have figured the through rates from the Arkansas territory to every point of destination in Ohio, Indiana and Illinois, and published a tariff of corresponding through rates from points in Mississippi and Georgia; but it was simpler to publish the low rate of 16 cents from Mississippi and Georgia points to Cairo (which was the same as the rate from Arkansas to Cairo), and form through rates by adding thereto the same local rates of the lines north of the Ohio River, which were being added to the Arkansas rate.

The publication of the 16-cent rate to Cairo from Mississippi, Louisiana and Alabama should be viewed in its true aspect, namely, as a convenient method for the ready computation of through rates; and not as a means whereby the entire movement of the lumber traffic was expected to be concentered upon Cairo, to the exclusion of other Ohio River crossings. It is, of course, not to the interest of all the Southern lines to actually route their lumber traffic via Cairo, for they may either not reach Cairo with their own rails, or may be deprived of their long haul if the lumber be routed via Cairo.

In routing lumber traffic from Mississippi territory to points north of the Ohio River via Cairo, the Southern lines up to Cairo receive as their proportion of the through rates the 16 cents herein referred to; because the 16 cents is a component part of the through rates to points of ultimate destination.

In routing lumber traffic, however, from Mississippi territory to points north of the Ohio River via Evansville, Louisville or Cincinnati, it is not possible for the Southern lines up to said crossings to get their regular published rates of 22, 21 and 23 cents respectively, which they charge on lumber destined to stop at said crossings; and in the division of through rates from points in Mississippi territory to points north of the Ohio River, the Southern lines reaching Evansville, Louisville and Cincinnati accept proportions which are materially less than 22, 21 and 23 cents respectively, and which vary within wide limits according to the ultimate point of destination, and according to the amount which the Northern line continuing the transportation from the Ohio River to destination may charge as its

local rate from the particular Ohio River crossing via which the traffic moves.

For illustration, we will suppose that a shipment of lumber moves via the Queen & Crescent route from Hattiesburg, Miss., a representative lumber shipping point, to Columbus, Ohio, a representative lumber consuming point. Cincinnati is the gateway for the Queen & Crescent route, and the lumber would accordingly move via Cincinnati.

The through rate, however, on which the shipment would move would be 29 cents per hundred pounds, based upon the low rate of 16 cents from Hattiesburg to Cairo, Ill., plus 13 cents, the charge which would be exacted by the Northern line from Cairo to Columbus, if it actually performed the service.

Via no other Ohio River crossing—not even Cincinnati—would it be possible to figure so low a total rate as the 29 cents, based upon Cairo. The local rate of the Northern line from Cincinnati to Columbus is 7½ cents, and out of the 29-cent through rate 7½ cents must be paid to the Northern line. The remainder of the 29-cent through rate, viz., 21½ cents, goes to the line from Hattiesburg to Cincinnati, and this amount is 1½ cents less than the regular published rate charged by the Queen & Crescent route on lumber destined to stop at Cincinnati.

Again: We will suppose that the Queen & Crescent route secures a shipment of lumber from Hattiesburg to Chicago, and that it hauls same via the Cincinnati gateway, and there delivers it to a Northern connection. The through rate from Hattiesburg to Chicago is 26 cents per hundred

pounds, based on 16 cents from Hattiesburg to Cairo, plus 10 cents, the local rate of the Northern line from Cairo to Chicago.

Via no other Ohio River crossing would it be possible to figure so low a total rate as the 26 cents based upon Cairo. The local rate of the Northern line from Cincinnati to Chicago is 11 cents per hundred pounds, and out of the 26-cent through rate, 11 cents must be paid to the Northern line. The remainder of the 26-cent through rate, viz., 15 cents, goes to the line from Hattiesburg to Cincinnati, and this amount is 8 cents less than the regular published rate charged by the Queen & Crescent route on lumber destined to stop at Cincinnati.

The service which the Queen & Crescent would perform with respect to the Columbus shipment, and with respect to the Chicago shipment, is identical; and yet in one instance it receives 6½ cents more as its revenue than it receives in the other.

The illustrations given are typical of the general situation, and show that in passing upon the reasonableness of the rates involved in this case, it is necessary to go to the root of the matter, instead of attempting to determine it, as the Interstate Commerce Commission did, upon the mere surface of tariff publications and upon the basis of short line mileages, by which the traffic by no means universally moves.

In the complaint filed by the Central Yellow Pine Association before the Interstate Commerce Commission, it was averred that complainants find their lumber markets "mainly in the several States north of Cairo, Ill."

In the majority report and opinion of the Commission it is said:

"Peoria, Indianapolis and Columbus are fairly representative points or markets for lumber in Ohio, Indiana and Illinois."

Trans., Vol. II, p. 964.

The line of the Illinois Central Railroad reaches three of the Ohio River crossings, viz.: Cairo, Evansville and Louisville. For the purpose of showing the revenue accruing to the Illinois Central Railroad up to said crossings, on shipments of lumber destined to points in Ohio, Indiana and Illinois, Mr. F. B. Bowes, Freight Traffic Manager of the I. C. R. R., filed Exhibit "F" (Trans., Vol. II, p. 853), in which he selected as representative points of destination, Decatur, Ill., Indianapolis and Columbus. It is shown by Mr. Compton's Exhibit "M" (Trans., Vol. II, pp. 875, 876), that the rate to Decatur, Ill., is the same as the rate to Peoria, Ill., from the Mississippi territory, and therefore Peoria may be substituted for Decatur in Mr. Bowes' calculations. By substituting Peoria for Decatur, Mr. Bowes' exhibit will conform exactly to the Commission's holding as to what points are representative markets for lumber in Ohio, Indiana and Illinois.

In the majority report and opinion it is said:

"The bridge tolls or transfer charges are 2 cents per hundred pounds at Cairo, 1½ cents at Evansville, 1 cent at Louisville and 2 cents at Cincinnati."

Trans., Vol. II, p. 963.

In Mr. Bowes' Exhibit "F" (Trans., Vol. II, pp. 853,

854), he states that the bridge tolls at Cairo, Evansville and Louisville were deducted from the through rates before making the calculations whereby the revenue per ton per mile accruing south of the Ohio River was obtained.

Combining Mr. Bowes' calculations, as contained in Exhibit "F" with a similar calculation as to the revenue accruing south of the Cincinnati gateway, based upon Compton's Exhibit "Q" (Trans., Vol. II, p. 880), and upon the majority report and opinion (Trans., Vol. II, pp. 963, 964), and substituting Peoria for Decatur, we have the following average results as to the revenue accruing to the lines south of the Ohio River via the four gateways, viz.: Cairo, Evansville, Louisville and Cincinnati.

Out of a through rate of 25 cents from Hattiesburg, Miss., a representative lumber shipping point, to Peoria, the line south of East Cairo would receive 14 cents. The distance via the Gulf & Ship Island and I. C. R. R. to East Cairo is 453 miles; and said 14 cents would yield a rate per ton per mile of 6.18 mills.

The distance from Hattiesburg to East Cairo via N. O. & N. E. and M. & O. is 435 miles (Trans., Vol. II, pp. 386, 480), and said rate of 14 cents would yield a rate per ton per mile of 6.44 mills.

Average up to Cairo.....6.31 mills.

Out of a through rate of 26 cents from Hattiesburg to Indianapolis, the line of the Illinois Central Railroad south of Evansville would receive 18½ cents for its haul of 605 miles via Jackson, which would yield 6.11 mills.

Out of a through rate from Hattiesburg to Columbus of

29 cents, the line of the Illinois Central Railroad south of Evansville would receive 16½ cents for its haul of 605 miles via Jackson, which would yield 5.45 mills.

Average up to Evansville.....5.78 mills.

Out of a through rate of 26 cents from Hattiesburg to Indianapolis, the line of the Illinois Central Railroad south of Louisville would receive 17 cents for its haul of 686 miles via Jackson, which would yield 4.95 mills.

Out of a through rate of 29 cents from Hattiesburg to Columbus, Ohio, the line of the Illinois Central Railroad south of Louisville would receive 16 cents for its haul of 686 miles via Jackson, which would yield 4.66 mills.

Average up to Louisville.....4.80 mills.

Out of a through rate of 29 cents from Hattiesburg to Columbus, Ohio, the line of the C. N. O. & T. P. Ry., A. G. S. R. R. and N. O. & N. E. R. R. south of Cincinnati would receive 19½ cents for its haul of 716 miles, which would yield 5.45 mills.

Average of the four crossings.....5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati, on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River, is less than the average rate per ton per mile on lumber from points in Ohio, Indiana, Illinois, Wisconsin and Michigan to New York City. Said last mentioned rates are charged in what

is known as Central Freight Association territory; and in its report and opinion in the case of H. H. Tift et al. v. Southern Ry. Co., et al., 10 I. C. Rep., 548, the Commission concedes "that because of the greater density of traffic in Central Freight Association territory and in Eastern territory, rates in general are made materially lower in those territories than in Southern territory."

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "S" (Trans., Vol. II, p. 883), which shows the rates on lumber in carloads to New York City from thirty representative points of shipment north of the Ohio River, in the States of Ohio, Indiana, Illinois, Wisconsin and Michigan. It also shows the short line distance; the rate; and the rate per ton per mile, from each of said points of shipment to New York City. It shows that the average distance is 911 miles; the average rate is 25.6 cents per hundred pounds, and the average rate per ton per mile is 5.6 mills.

Trans., Vol. II, p. 883.

We have hereinbefore shown that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile from the Mississippi territory

to 21 representative points of destination in Illinois, Indiana, Kentucky, Ohio, New York, Pennsylvania and Michigan.

Exhibit "A" to F. B. Bowes' testimony (Trans., Vol. II, pp. 846, 847), contains, among other things, a statement of the rates from McComb, Miss., a representative lumber shipping point on the line of the Illinois Central Railroad, to 21 representative points of destination in Illinois, Indiana, Kentucky, Ohio, New York, Pennsylvania and Michigan.

From said point of origin to each of said points of destination the through rate is shown; also the short line distance. Said statement also shows the "charges in mills per ton per mile" from McComb to each of said points of destination. It also shows that the "average carrying charge in mills per ton per mile" from McComb to all of said destinations on the basis of the present rates is 6 mills.

Trans., Vol. II, p. 868.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from points in Minnesota and Wisconsin to Chicago.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "E" (Trans., Vol. II, p. 868), which shows the rates on lumber in carloads from ten representative points in Minnesota and Wisconsin to Chicago, Ill. It shows that the average rate from all of said points of origin to Chicago is 10.8 cents per hundred pounds; the average distance 359.7 miles, and the average rate per ton per mile 6.03 mills.

Trans., Vol. II, p. 868.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from points in Arkansas, Texas and Louisiana to points in Illinois, Wisconsin, Indiana, Pennsylvania, New York, Missouri and Kentucky.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "N" (Trans., Vol. II, pp. 877, 878), showing the rates on lumber from numerous representative points of origin in Arkansas, Texas and Louisiana to 38 representative points of destination, in the States of Illinois, Wisconsin, Ohio, Kentucky, Indiana, Pennsyl-

vania and New York, and also to St. Louis, Mo. Said statement shows the mileages and rates from said points of origin to said points of destination. It shows that the average mileage is 846 miles, and that the average rate per ton per mile is 6.59 mills.

Trans., Vol. II, pp. 877, 878.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio river is less than the average rate per ton per mile received by the roads north of the Ohio River on lumber from Georgia, Alabama and Mississippi, carried by the defendants to the Ohio River.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "Q" (Trans., Vol. II, pp. 880, 881), which shows the rates on lumber in carloads received by the lines north of the Ohio River, from Cairo to Cincinnati, inclusive, to 32 representative points of destination in the territory north of the Ohio River.

Said statement shows the rates from each of said Ohio River crossings to each point of destination, the mileage, and the rate per ton per mile. It also shows the average

rate from all of said crossings to each of said points of destination, and the average rate per ton per mile. It also shows the average mileage from all of said crossings, to all of said destinations, to be 317 miles; and the average rate per ton per mile to be 6.91 mills.

Trans., Vol. II, pp. 880, 881.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati, on lumber originating in Mississippi territory, and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from stations on the Norfolk & Western Railway to New York City, approved, in effect, by the Commission itself.

In the case of the National Wholesale Lumber Dealers' Association v. N. & W. Ry. Co. et al., 9 I. C. Rep., p. 90, certain rates on lumber from certain points on the N. & W. Ry. to New York City were complained of as being unreasonably high.

On page 90 of the report and opinion of the Commission in that case is a table showing the names of said stations, and the distances, rates per hundred pounds, and rates per ton per mile on lumber other than oak, from each of said

stations to New York City, from December 28, 1892, to the date of the hearing of said case. Said statement shows that at the date of said hearing the rates per ton per mile from said stations to New York on lumber other than oak varied from 7.8 mills to 8.8 mills.

The Commission ordered (see page 87) that there should be an aggregate reduction of 2½ cents per hundred pounds in said through rates. And after making said reduction, as ordered by the Commission, the rates per ton per mile on lumber other than oak from said stations to New York varied from 7.1 mills to 7.4 mills.

9 I. C. Rep., pp. 87, 90, National Wholesale Lumber Dealers' Assn. v. N. & W. Ry. Co. et al.

We insist that after said reduction of 2½ cents per hundred pounds was made in said rates, as ordered by the Commission in said case, the rates as reduced were, in effect, approved by the Commission, and the rates per ton per mile resulting from the reduced rates varied, as just shown, from 7.1 mills to 7.4 mills.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

The Commission, in its report and opinion, in the case just cited, said that the lumber rates of the Norfolk & Western Railway should be somewhat lower than might be reasonable in distinctly Southern territory; and yet the average rates per ton per mile of the Norfolk & Western Railway on

lumber in that case, even after making the reduction ordered by the Commission, are materially higher than the average rate per ton per mile yielded by the revenue of the appellants on traffic destined to points beyond the Ohio River.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from points in Michigan and Wisconsin to points on the Missouri River and beyond.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "R" (Trans., Vol. II, p. 882), showing the rates on lumber from nine representative points of origin in Michigan and Wisconsin, to eight representative points of destination, on the Missouri River and beyond. Said statement shows the average short line distance to be 808 miles; the average rate to be 28.6 cents; and the average rate per ton per mile to be 7.1 mills.

Trans., Vol. II, p. 882.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louis-

ville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from points on the Texas & Pacific Railway in Texas, Louisiana and Arkansas to Missouri River points.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "O" (Trans., Vol. II, p. 879), showing the rates on lumber in carloads from stations on the Texas & Pacific Railway in Texas, Louisiana and Arkansas to Missouri River points. It shows the distance from Shreveport, La., which is fairly representative of the distance from said stations of origin to said points of destination. It also shows the rates from all of said stations of origin to all of said points of destination. It also shows the average rate per ton per mile from all of said stations of origin to all of said points of destination to be 7.37 mills.

Trans., Vol. II, p. 879.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from points in Michigan to points in Central Freight Association territory.

In his testimony before the Commission, Mr. C. B. Compton filed a statement marked Exhibit "D" (Trans., Vol. II, p. 867), showing the rates on pine lumber from points in Michigan to points in Central Freight Association territory, viz.: Cincinnati, Louisville, Evansville, Cairo, Columbus, Cleveland, Indianapolis, Terre Haute, Pittsburg and Chicago. It shows the rate and distance from each of said points of origin to each of said points of destination. It shows that the average mileage from all of said points of origin to all of said points of destination is 389 miles. It shows that the average rate from all of said points of origin to all of said points of destination is 15.1 cents; and that the average rate per ton per mile from all of said points of origin to all of said points of destination is 7.8 mills per ton per mile.

Trans., Vol. II, p. 867.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from stations on the Texas & Pacific Railway in Texas, Louisiana and Arkansas to Clayton, N. M., and Trinidad, Grey Creek, LaJunta, Pueblo and Denver, Colo.

In his testimony before the Commission, Mr. C. B. Comp-

ton filed a statement marked Exhibit "P" (Trans., Vol. II, p. 879), which shows the distance from Shreveport, La., which is fairly representative of the distances from all of said stations of origin to said points of destination. Said statement also shows the rates from all of said stations of origin to all of said points of destination. It also shows the average rate per ton per mile from all of said stations of origin to all of said points of destination to be 8.31 mills.

Trans., Vol. II, p. 879.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

The testimony shows that the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than the average rate per ton per mile on lumber from Camden, Ark., and Trinity, Tex., to Wichita, Kas., approved, in effect, by the Commission itself.

In the case of the Mayor, etc., of Wichita v. C. R. I. & P. Ry. Co. et al., 9 I. C. Rep., pp. 573, 579, certain rates on lumber from Camden to Wichita, and from Trinity to Wichita, were complained of as being unreasonably high.

On page 573, of the report and opinion of the Commission in that case, is a table showing the names of said sta-

tions, and the distances, and rates per hundred pounds, on lumber. The distance from Camden to Wichita is 607 miles, and from Trinity to Wichita the distance is 633 miles. The rate from both Camden and Trinity to Wichita was 28½ cents per hundred pounds. The Commission decided (see page 579) that any rate from Camden or Trinity to Wichita beyond 27½ cents was unreasonable; which amounted to a reduction in said rates of 1 cent per hundred pounds. Under the rate of 28½ cents, the rate per ton per mile from Camden to Wichita was 9.4 mills; and the rate per ton per mile from Trinity to Wichita was 9.3 mills. After the reduction of 1 cent per hundred pounds was made in said rates, as ordered by the Commission, they were reduced to 27½ cents per hundred pounds; and under said reduced rates, the rate per ton per mile from Camden to Wichita became 9 mills; and the rate per ton per mile from Trinity to Wichita became 8.7 mills.

9 I. C. Rep., pp. 573, 579, Mayor, etc., of Wichita v. C. R. I. & P. Ry. et al.

We insist that after said reduction of 1 cent per hundred pounds was made in said rates, as ordered by the Commission in said case, the rates as reduced were, in effect, approved by the Commission, and the rates per ton per mile resulting from the reduced rates varied, as just shown, from 8.7 mills to 9 mills.

We have hereinbefore shown in this section that the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River is only 5.59 mills.

* * * * * *

We submit herewith a recapitulation of the foregoing comparison between the average rate per ton per mile accruing up to the four Ohio River crossings on lumber originating in Mississippi territory and destined to representative points north of the Ohio River, and the rates per ton per mile charged by other carriers for the transportation of lumber in other sections of the United States:

The average rate per ton per mile from Camden to Wichita, in effect, approved by the Commission .....9. mills

The average rate per ton per mile from Trinity to Wichita, in effect, approved by the Commission .....8.7 mills

The average rate per ton per mile from stations on the T. & P. Railway in Texas, Louisiana and Arkansas, to points in New Mexico and Colorado .....8.31 mills

The average rate per ton per mile from points in Michigan to points in Central Freight Association territory .....7.8 mills

The average rate per ton per mile from stations on the T. & P. Railway, in Texas, Louisiana and Arkansas, to Missouri River points.....7.37 mills

The average rate per ton per mile from points in Michigan and Wisconsin to points on and beyond the Missouri River .....7.1 mills

The average rate per ton per mile from certain points on N. & W. Railway to New York, in effect, approved by the Commission.....7.1 mills

The average rate per ton per mile received by roads north of the Ohio River from Ohio River crossings to points north of the Ohio River...6.91 mills

The average rate per ton per mile from points in Arkansas, Texas and Louisiana to points in Illinois, Wisconsin, Ohio, Kentucky, Indiana, Pennsylvania, New York, etc.....6.59 mills

The average rate per ton per mile from points in Minnesota and Wisconsin to Chicago.....6.03 mills

The average rate per ton per mile from Mississippi territory to representative destinations in territory north of the Ohio River.....6 mills

The average rate per ton per mile from points in Ohio, Indiana, Illinois, Wisconsin and Michigan to New York City .....5.6 mills

The average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River, it being the rate per ton per mile in controversy .....5.59 mills

It will be seen that the average rates per ton per mile used in the foregoing comparisons represent lumber rates charged in Texas, New Mexico, Kansas, Arkansas, Missouri, Minnesota, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania and New York.

It will be further seen that the average revenue per ton per mile accruing to the lines south of Cairo, Evansville,

Louisville and Cincinnati on lumber originating in Mississippi territory and destined to representative markets of consumption in territory north of the Ohio River is less than any of the other rates per ton per mile with which it is compared. We insist that it was error of law for the Commission, and the Court, to refuse to give to said comparisons the legal value to which they are entitled.

X.

THE RATES FROM MISSISSIPPI POINTS TO OHIO RIVER POINTS AND POINTS BEYOND ARE REASONABLY LOW, BECAUSE THEY ARE LOWER THAN THE RATES ON LUMBER BETWEEN MANY OTHER POINTS FOR SIMILAR DISTANCES.

Mr. Green, in his testimony before the Commission, filed a statement marked Exhibit No. 10 (Trans., Vol. II, pp. 903, 904, 905), which contains a comparison of existing rates on lumber, and of distances, from points in Mississippi to points on and beyond the Ohio River, with existing rates on lumber, and distances between various other points in the United States. While the statements filed by Mr. Bowes and Mr. Compton compare the average rates per ton per mile, Mr. Green's statement compares the rates themselves; and it show that the rates from points in Mississippi to points of destination, on and beyond the Ohio River, are lower than the rates on lumber between many other points for substantially similar distances.

For instance, it shows that the rate on lumber from Black Mountain, N. C., to Louisville, Ky., is 18 cents, for a distance of 411 miles; while the rate from Laurel, Miss., to Cairo, Ill., for a distance two miles greater is but 16 cents.

It shows that the rate on lumber from Winston-Salem, N. C., to Pittsburg, Pa., is 23½ cents, for a distance of 577 miles; while the rate from Lumberton, Miss., to Mt. Vernon, Ill., for a distance one mile greater is only 20 cents.

It shows that the rate on lumber from Hot Springs, N. C., to Kensington, Ohio, is 29½ cents, for a distance of 658 miles; while the rate from Lumberton, Miss., to Louisville, Ky., for exactly the same distance is only 2[illegible] cents.

It shows that the rate from Seattle, Wash., to Shelby Junction, Mont., is 35 cents, for a distance of 750 miles; while the rate from Lumberton, Miss., to Peoria, Ill., for a distance one mile greater is only 25 cents.

It shows that the rate on lumber from Tacoma, Wash., to Sacramento, Cal., is 35 cents, for a distance of 827 miles; while the rate from Lumberton, Miss., to Joliet, Ill., for exactly the same distance is only 26 cents.

It shows that the rate on lumber from Charlevoix, Mich., to Chillicothe, Ohio, is 30 cents, for a distance of 836 miles; while the rate from Hattiesburg, Miss., to Columbus, Ohio, for exactly the same distance is only 29 cents.

It shows that the rate on lumber from Tacoma, Wash., to Livingston, Mont., is 50 cents, for a distance of 905 miles; while the rate from Hattiesburg, Miss., to Coshocton, Ohio, for a distance of 904 miles is only 31 cents.

It shows that the rate from Spokane, Wash., to Bismarck, N. D., is 50 cents, for a distance of 1,068 miles; while the

rate from Lumberton, Miss., to Toledo, Ohio, for a distance 10 miles greater is only 30 cents.

Trans., Vol. II, pp. 903, 904, 905.

Many other comparisons will be found in said statement which were wholly uncontradicted; and we insist that it was error of law for the Commission, and the Court, to refuse to give to said comparisons the legal value to which they are entitled.

The legal value of comparisons between rates, on the question of the reasonableness of rates, was recognized by Judge MacDowell in the case of I. C. C. v. Southern Ry., 117 Fed. Rep., p. 745; affirmed 122 Fed Rep., p. 800.

In the case of Cotting v. K. C. Stockyards, 183 U. S., p. 98, this Court said:

"In the absence of testimony to the contrary, a customary charge should be regarded as reasonable and rightful."

A case cited with approval by this Court in the Cotting case, held that:

"The law makes it the duty of every common carrier to receive and carry all goods . . . and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained *by the amount commonly, or customarily paid for other like services.*"

183 U. S., p. 98.

The position of the Commission with respect to the value

of comparisons for the purpose of determining the reasonableness of rates has been by no means consistent.

In the case of the Cattle Raisers Assn. of Texas v. M. K. & T. Ry. et al., in which the reasonableness of the rates on cattle, which were the subject of complaint, was sought to be sustained by exhaustive comparisons with higher rates upon cattle in other sections of the United States and in Canada and Mexico, the Commission attached little weight to the comparisons, and said that their value was "not great."

11 I. C. Rep., pp. 338, 339.

In the case, however, of the National Wholesale Lumber Dealers' Association v. N. & W. Ry. et al., involving the reasonableness of lumber rates from points on the N. & W. Ry. to New York City, the Commission found that the rates from N. & W. points were higher than those from either C. & O. or B. & O. points to New York; and that the rates on lumber from Indiana and Michigan points to New York were upon the basis of rate per ton per mile relatively much less than from N. & W. points.

9 I. C. Rep., pp. 111, 113.

The Commission further compared the rates from N. & W. stations to New York with rates from Southern points to New York, and accounted for the fact that conditions generally in the South justified higher rates.

9 I. C. Rep., p. 112.

In said case, after instituting the comparisons mentioned, the Commission held that upon all the facts and circumstances the through rates from N. & W. stations to New York were unreasonable and should be reduced 2½ cents per hundred pounds.

9 I. C. Rep., p. 87.

If comparisons are regarded by the Commission as of legal value for the purpose of reducing rates, it would seem but fair that the Commission should regard them as of legal value for the purpose of sustaining the reasonableness of existing rates; especially when the reasonableness of the existing rates has been, as in the present case, sustained by comparions in an overwhelming manner.

XI.

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, Because it is to the Interest of the Appellants that they Should be So.

Appellants submit as further evidence that their rates on lumber from shipping points in Mississippi territory to the Ohio River crossings are just and reasonable, the fact that they have the strongest possible motives for keeping the rates down to a point low enough to allow the traffic to move; otherwise they would lose it altogether.

9 Ry. & Can. Traf. Cas. (Browne & McNamara), pp. 114, 119.

Ricketts Smith et. al. v. Midland Ry. Co. et al.

In the case just cited, Collins, J., said:

"It is of vital importance to the defendants not to drive the trade away, and I think their enlightened self-interest may be trusted to prevent them doing so; and so far as I can form an opinion upon the statistics, they have not done so."

Ibid, p. 119.

The testimony in this case shows that the appellants

were the real pioneers in introducing yellow pine lumber into the territory on and north of the Ohio River.

They undertook to foster Southern yellow pine interests by introducing the Southern pine into that territory.

They systematically had their representatives undertake to set forth its merits in order that it might be introduced.

The roads used it in manufacturing cars in their own shops.

They put it into their specifications so as to require other manufacturers of their cars to use it.

They so adjusted their rates as to enable it to compete successfully with other lumber on and north of the Ohio River.

No such favorable adjustment of rates was ever made by the Southern lines for any other commodity.

Trans., Vol. II, p. 270.
Trans., Vol. II, p. 417.

We insist that it was error of law for the Commission, and the Court, to refuse to give to those facts the legal value to which they are entitled.

XII.

The Rates from Mississippi Territory are Reasonable, Because the Lumber Interests in Alabama, Mississippi and Louisiana Have Prospered under the Rate Adjustment Made by Appellants.

Appellants submit as further evidence that their rates on lumber from Mississippi territory to Ohio River crossings are just and reasonable, the fact that the lumber interests there have prospered under the rate adjustments made by appellants from time to time.

The lumber establishments in Alabama have increased from 284 in 1870 to 1,111 in 1900.

12th Census, 1900, Vol. IX, Manufactures, Part III, pp. 807-810.

The lumber capital in Alabama has increased from $744,005 in 1870 to $13,020,183 in 1900.

Same citation.

The lumber establishments in Mississippi have increased from 265 in 1870 to 844 in 1900.

Same citation.

The lumber capital in Mississippi has increased from $1,153,917 in 1870 to $17,337,538 in 1900.

Same citation.

The lumber establishments in Louisiana have increased from 152 in 1870 to 432 in 1900.

Same citation.

The lumber capital in Louisiana has increased from $541,800 in 1870 to $20,093,044 in 1900.

Same citation.

The yellow pine lumber shipped from points on the L. & N. R. R. (M. & M. Division) increased from 2,540 cars in 1888 to 7,111 cars in 1902.

Trans., Vol. II, pp. 290, 291, 896.

We insist that it was error of law for the Commission, and the Court, to refuse to give to these facts the legal value to which they are entitled.

XIII.

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, Because the Percentage of Increase has been Greater in the Price of Lumber than in the Rates on Lumber.

Appellants submit as further evidence that their rates on lumber from shipping points in Mississippi territory to the Ohio River crossings are just and reasonable, the fact that the percentage of increase has been greater in the price of lumber than in the rates on lumber.

The tables appearing in the report and opinion of the majority of the Commission in this case (Trans., Vol. II, p. 970), show that the lowest point of depression in the Chicago lumber market was reached in 1897; and that the prices of lumber in the Chicago market steadily and continuously increased during 1898, 1899 and 1900; that there was a slight falling off in prices during 1901, which was fully recovered

in 1902, when prices higher than any during the previous five years were reached.

To illustrate, the prices in Chicago during the first quarter of 1897 and 1902 respectively, were as follows:

Grade	1897	1902	Percentage of Increase
A.	$12 00	$22 50 to $23 50	91.6
B.	10 00	18 50 to 19 50	90
C.	15 50	19 50 to 22 00	34
Average			71.8

During the period from the first quarter of 1897 to the first quarter of 1902 there were only two increases of 1 cent each in the rates to Chicago from Mississippi territory. The rate to Chicago in the first quarter of 1897 was 22 cents, and (including said increases) the rate to Chicago in the first quarter of 1902 was 24 cents; which amounts to an increase of only 9.09 per cent.

Trans., Vol. II, p. 852.

In other words, while the price of yellow pine lumber in the Chicago market, between the first quarter of 1897 and the first quarter of 1902 increased 71.8 per cent, the rate on lumber from Mississippi territory to Chicago increased only 9.09 per cent.

To further illustrate: The prices of lumber in the Chicago market during the first quarter of 1897 and the first quarter of 1905 were as follows:

Grade	1897	1905	Percentage of Increase
A.	$12 00	$20 00 to $22 00	75.0
B.	10 00	18 50 to 19 50	90.0
C.	15 50	20 50 to 21 50	35.5
Average			66.8

During the period from the first quarter of 1897 to the first quarter of 1905 there were two increases of 1 cent each, and one increase of 2 cents (which latter increase is the one complained of in this case), making a total increase during that period of 4 cents in the rates to Chicago from Mississippi territory. The rate to Chicago in the first quarter of 1897 was 22 cents, and (including all three of said increases) the rate to Chicago in the first quarter of 1905 was 26 cents; which amounts to an increase of only 18.1 per cent.

Bowes, Exhibit "D," Trans., Vol. II, p. 852.
Compton, Exhibit No. 4, Trans., Vol. II, p. 195.

In other words, while the prices of yellow pine lumber in the Chicago market between the first quarter of 1897, and the first quarter of 1905 increased 66.8 per cent, the rates on lumber from Mississippi territory increased (including the 2 cents increase complained of), only 18.1 per cent.

The testimony shows that between June 1, 1899, and April 1, 1903, there was a marked increase in the price of every one of twenty different grades of yellow pine lumber in the St. Louis market.

Compton, Exhibit "G," Trans., Vol. II, pp. 278, 279, 870.

The average price paid by the Southern Railway Company for yellow pine lumber for the fiscal year ending June 30, 1899, was $9.84 per thousand feet, and for the fiscal year ending June 30, 1903, it was $13.43 per thousand feet, an increase of $3.59 per thousand feet, or 36.5 per cent.

Green, Ex. No. 13, Trans., Vol. II, p. 907.

The average price per thousand feet of yellow pine used by the N. O. & N. E. R. R. increased from $9.25 in 1899 to $11.79 in 1903, an increase of 27.46 per cent.

Jones, Ex. No. 2, Trans., Vol. II, pp. 425, 913.

The prices of certain yellow pine lumber (dimension stuff) purchased by the Louisville & Nashville Railroad increased from January, 1901, to March, 1903, to a very marked extent.

Compton Exhibit "T," Trans., Vol. II, pp. 884, 885.

We insist that it was error of law for the Commission, and the Court, to refuse to give to these facts the legal value to which they are entitled.

XIV.

The Rates from Mississippi Territory to the Ohio River are Reasonably Low, Because the Transportation of Lumber is Exceptionally Expensive to the Carrier.

Appellants submit as further evidence that their rates on lumber from shipping points in Mississippi territory to the Ohio River crossings are just and reasonable, the fact that the transportation of the lumber in controversy is exceptionally expensive to the carrier.

About 30 per cent of the lumber handled by the L. & N. R. R., the N. O. & N. E. R. R., and the A. & V. Ry. is transported on flat cars

Compton, Trans., Vol. II, p. 266.

Steele, Trans., Vol. II, p. 420.

About 65 per cent of the lumber handled by the M. & O. R. R. to points on and north of the Ohio River moves on flat cars.

Miller, Trans., Vol. II, p. 384.

From 85 to 100 per cent of the flat cars are hauled south empty.

Miller, Trans., Vol. II, p. 384.
Green., Trans., Vol. II, p. 214.
Compton, Trans., Vol. II, pp. 266, 267.

The flat car is the most economical to the shipper, because it costs him very much less to load a flat car than to load a box car.

Steele, Trans., Vol. II, pp. 415, 416.

Flat cars are very much more expensive for the railroads to furnish, because so large a per cent of them have to be hauled South empty, and in the case of foreign cars, they cost 20 cents per day for rent.

Steele, Trans., Vol. II, pp. 415, 416.
Green, Trans., Vol. II, p. 214.

Mr. Compton testifies that flat cars are furnished at the instance of shippers, and that their reason for desiring them is on account of the lengths of lumber which it is inconvenient to load in box cars; and for the further reason that it is cheaper to load a flat car than to load a box car.

Compton, Trans., Vol. II, p. 267.

Mr. Miller testifies that flat cars are furnished on the M. & O. R. R. in response to the demands of shippers.

Miller, Trans., Vol. II, p. 384.

Therefore the flat cars which are preferred by shippers for lumber, constitute a special equipment which the carriers are compelled to provide for the lumber business in controversy.

We insist that it was error of law for the Commission, and the Court, to refuse to give those facts the legal value to which they are entitled.

XV.

THE RATES FROM MISSISSIPPI TERRITORY TO THE OHIO RIVER ARE REASONABLY LOW, BECAUSE APPELLANTS' OPERATING EXPENSES HAVE MATERIALLY INCREASED IN RECENT YEARS.

Appellants submit as further evidence that their rates on lumber from shipping points in Mississippi territory to the Ohio River crossings are just and reasonable, the fact that their operating expenses have materially increased in recent years.

The report and opinion in this case (Trans., Vol. II. p. 975) admits that appellants' operating expenses have increased from year to year. It says, however, that those increases are due to the growth of business resulting from the larger mileage operated.

Appellants will hereinafter show that the increase in their mileage in 1902 over 1901 was only 1.05 per cent, while the increase in their operating expenses in 1902 over 1901 was 10.47 per cent; and that while the increase in their mileage in 1903 over 1902 was only 2.62 per cent, the in-

crease in their operating expenses in 1903 over 1902 was 14.66 per cent.

The testimony shows that the cost of operating railroads in the South has greatly increased in recent years.

The cost of lumber purchased by the Southern Railway increased as follows:

1899 over 1898 .....16.3 per cent.
1900 over 1899 .....84. per cent.
1901 over 1900 .....13.9 per cent.
1902 over 1901 .....12.1 per cent.
Green, Ex. 13, Trans., Vol. II, p. 907.

The cost of fuel purchased by the Southern Railway increased as follows:

1899 over 1898 .....18.38 per cent.
1900 over 1899 .....53.66 per cent.
1901 over 1900 .....20.11 per cent.
1902 over 1901 .....15.56 per cent.
1903 over 1902 .....30.21 per cent.
Green, Ex. 13, Trans., Vol. II, p. 908.

The cost of wages on the Southern Railway increased as follows:

1899 over 1898 .....17.25 per cent.
1900 over 1899 .....21.43 per cent.
1901 over 1900 ..... 6.53 per cent.
1902 over 1901 .....14.47 per cent.
1903 over 1902 .....19.97 per cent.
Green, Ex. 13, Trans., Vol. II, p. 907.

The cost of steel rails on the Southern Railway increased as follows:

1903 over 1898 .....57.75 per cent.
Green, Ex. 13, Trans., Vol. II, p. 908.

The cost of equipment on the Southern Railway has increased as follows:

Locomotives: 1902 over 1898 .....26.5 per cent.
1903 over 1902 .....11.73 per cent.
Box Cars: 1902 over 1899 .....38.4 per cent.
1903 over 1902 .....22.78 per cent.
Flat Cars: 1902 over 1898 .....67.8 per cent.

Coal and Gondola Cars:

1902 over 1898 .....83.6 per cent.
1903 over 1902 ..... 5.01 per cent.
Green, Ex. 13, Trans., Vol. II, pp. 908, 909.

The increase in the average price paid for coal and gondola cars by the Southern Railway in 1903 over that paid in 1898 was $446.46, or 121.8 per cent.
Green, Ex. 13, Trans., Vol. II, p. 909.

Mr. Green states that the increased cost of locomotives and cars has not been occasioned altogether by increased size, power or capacity; but largely by the increased prices of labor and materials, resulting in an increased cost per unit of power and capacity.
Green, Ex. 13, Trans., Vol. II, p. 909.

The percentages of increase in the average daily pay of

employes on the Mobile & Ohio Railroad in 1903 over 1899 were as follows:

Engineers ..... 33.7 per cent.
Firemen .....30 per cent.
Conductors .....51.9 per cent.
Brakemen .....61.5 per cent.
Taylor, Trans., Vol. II, p. 935.

The percentages of increase in the cost of various kinds of equipment on the M. & O. R. R. were as follows in 1902 as compared with 1898:

Steel rail ..... 55.5 per cent.
Engines (of same character in each instance) ..... 68.4 per cent.
Box cars ..... 61 per cent.
Flat cars .....193.4 per cent.
Coal cars ..... 56.1 per cent.
Taylor, Trans., Vol. II, p. 935.

On the Illinois Central Railroad the prices of locomotives, box cars, and coal and gondola cars, had increased in 1903 as compared with 1899, by the following percentages, viz.:

Locomotives, per unit of efficiency....74.3 per cent.
Box cars, per unit of capacity.....49.4 per cent.
Coal and gondola cars, per unit of capacity .....63.3 per cent.
Wallace, Trans., Vol. II, pp. 330, 331.

From July, 1897, to June, 1900, the average cost of coal at the mines, to the Illinois Central Railroad, was

85.36 cents; from July, 1900, to June, 1903, the average cost of coal at the mines was 99.73 cents. Increase, 16.8 per cent.

Wallace, Trans., Vol. II, p. 329.

The Illinois Central Railroad has been compelled through negotiations with labor organizations to advance its rates of pay for labor, and in 1903 was on a basis of approximately $2,000,000 more per year for labor than it was two years before.

Wallace, Trans., Vol. II, p. 331.

One element in the increased cost of labor to the Illinois Central Railroad is the shortening of hours. In the summer of 1903, in response to the demands of the order of railway telegraphers, the expenses of the Illinois Central Railroad, as to that class of employes alone, were increased by $40,000 or $50,000 per year.

Wallace, Trans., Vol. II, p. 332.

Mr. L. A. Jones files elaborate exhibits showing the various increases in prices of labor, materials and equipment purchased by the N. O. & N. E. R. R.

Said exhibits show the following percentages of increase in prices paid by the N. O. & N. E. R. R., in the year 1903, as compared with 1899, viz:

Pine lumber, per M.....27.46 per cent.
Fuel, per ton .....43.07 per cent.
Steel rail, per ton .....53.35 per cent.
Box cars 60,000 lbs. capacity.....29.90 per cent.
Flat cars 60,000 lbs. capacity .....46.33 per cent.
Coal cars 60,000 lbs. capacity .....50.96 per cent.

Jones, Exhibits Nos. 2, 3, 4 and 6, Trans. Vol. II, pp. 913, 914.

From December 1, 1898, to the close of the year 1903, wages on the N. O. & N. E. had been increased as follows:

Engineers and Firemen—
Three advances of 5 per cent each.

Trainmen—
Three advances of 5 per cent each.

Switchmen—
Two advances of 5 per cent each, one advance of 6 per cent.

Shopmen—
Three advances of 5, 3 and 7 per cent, respectively.

Trackmen—
One advance of 11 per cent.

Station labor at New Orleans—
Two advances of 7 and 9 per cent respectively.

In addition to the general increases on classified men, increases have been given at individual localities, and agents and operators, hostlers and wipers, car cleaners and all other employes have been increased from time to time.

Jones, Ex. 1, Trans., Vol. II, pp. 912, 913.

Substantially the same is shown by the exhibits filed by Mr. Jones with reference to the Alabama & Vicksburg Railway.

Jones, Exhibits Nos. 7, 8, 9, 10, 11 and 12, Trans., Vol. II, pp. 914, 915, 916.

We insist that it was error of law for the Commission,

and the Court, to refuse to give to those facts the legal value to which they are entitled.

XVI.

THE RATES FROM MISSISSIPPI TERRITORY TO THE OHIO RIVER ARE, IN THE OPINION OF COMPETENT EXPERTS, REASONABLY LOW.

Appellants submit as further evidence that their rates on lumber from shipping points in Mississippi territory to the Ohio River crossings are just and reasonable, the fact that the following named experts state that in their opinion said rates are reasonably low, and they state, as the reasons upon which they base their opinions, the facts set forth hereinbefore in sections VIII to XV inclusive.

We insist that the opinions of said experts, while not controlling, are entitled to great weight; especially as they are opposed by only three of the five experts constituting the Commission.

93 Fed. Rep., pp. 88, 89, I. C. C. v. W. & A. R. R. Co.

The experts introduced on behalf of the defendants were: Mr C. B. Compton, Traffic Manager L. & N. R. R. Co.; Mr. L. Green, at present Freight Traffic Manager of the Southern Railway Co.; Mr. HaidenMiller, at present Freight Traffic Manager of the Mobile & Ohio Railroad Co.; Mr. F. B. Bowes, Freight Traffic Manager Illinois Central Railroad Co.; and Mr. T. F. Steele, General Freight Agent of the New Orleans & Northeastern and Alabama & Vicksburg railroads.

In summing up his testimony on the question of reasonableness of the rates in controversy, Mr. Compton said:

"I think if you measure the rate of to-day by a comparison with other rates, the rates in themselves and as compared with the rates from other producing territory of yellow pine are reasonable. I do not see how I could reach any other conclusion but that these are reasonable rates. They have permitted the free movement of the business in competition with business of a similar character."

Compton, Trans., Vol. II, p. 293.

Mr. Green testified:

"I think the existing rates are just and reasonable, because, among other reasons, they permit a free movement of the traffic at a profit to the manufacturer; because they do not yield the carrier an excessive profit; because they are as low as the published rates from other yellow pine producing sections with which this section (i. e., Mississippi territory) must compete; and because they compare favorably with the rates on all kinds of lumber for corresponding distances between other parts of the country where the conditions surrounding transportation are similar. It seems to me those are reasons sufficient to sustain the reasonableness of this particular rate."

Green, Trans., Vol. II, pp. 229, 230.

Mr. Bowes for like reasons testified that in his opinion "the present adjustment is a reasonable one."

Bowes, Trans., Vol. II, pp. 475, 476.

To the same effect was the testimony of Mr. Haiden Miller.

Miller, Trans., Vol. II, pp. 387, 388.

We insist that it was error of law for the Commission, and the Court, to refuse to give to expert testimony the legal value to which it is entitled.

XVII.

The Increase of Two Cents per Hundred Pounds Made Effective April 15, 1903, was Justified by the Change in Competitive Conditions.

The majority of the Commission was of opinion that the maintenance of materially lower rates on lumber for several years previous to the increase of 2 cents on April 15, 1903, brought the case within the rule announced in Holmes v. Southern Ry. Co., 8 I. C. Rep., 561, viz.:

"The continuance of a given rate is not conclusive evidence of the reasonableness of that rate; but when a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company which tends to show the unreasonableness of the advance."

Holmes v. Southern Ry. Co., 8 I. C. Rep., 561.
Trans., Vol. II, p. 994.

It will be seen that the Commission concedes that the continuance of a given rate "is not conclusive evidence" of the reasonableness of that rate; and that the increase of such a rate merely tends to show the unreasonableness of the increase. The bare presumption of the reasonableness of a rate which is said to arise merely from the fact of its voluntary continuance by a carrier has been entirely re-

moved by the testimony in this case, which shows that the previous rates were not rates made voluntarily by the appellants, but were forced upon them by competition with the lines from Arkansas and by the depressed condition of the lumber market which prevailed for many years.

It is conceded by the Commission that prior to May 1, 1894, the rate to Cairo from the Mississippi territory was 2 cents per one hundred pounds higher than the rate from Arkansas to Cairo.

Trans., Vol. II, pp. 966, 967.

It is conceded by the Commission that on May 1, 1894, appellants reduced their rates from said Mississippi territory 2 cents per hundred pounds so as to make them the same as the rate from Arkansas, and thereby meet said Arkansas competition.

Trans., Vol. II, pp. 966, 967.

The testimony in the case shows that the lines leading from the Mississippi territory have since May 1, 1894, continued to meet the Arkansas competition by maintaining from Mississippi territory to Cairo the same rate as prevailed from Arkansas territory to Cairo.

On April 15, 1903, said competing lines leading from Arkansas to Cairo increased their rates 2 cents per hundred pounds (Trans., Vol. II, p. 964); and it was this fact which enabled appellants to make said increase of 2 cents per hundred pounds from Mississippi territory to Cairo which is complained of in this case.

In other words, if it had not been for the Arkansas com-

petition, the appellants would not have been forced to reduce their rates 2 cents per hundred pounds on May 1, 1894; and if the competing lines from Arkansas had not increased their rates 2 cents per hundred pounds on April 15, 1903, it would not have been possible for appellants on April 15, 1903, to have made the increase of 2 cents per hundred pounds in their rates from Mississippi territory to Cairo, which is complained of in this case.

The rates charged by appellants, prior to said increase of 2 cents per hundred pounds, were accepted by them, not as being reasonably high, but as being the highest they could secure under the stress of Arkansas competition; and we insist that it was error of law for the Commission, and the Court, to refuse to distinguish between a case where rates are accepted by a carrier voluntarily, and this case, where the rates maintained by appellants prior to April 15, 1903, were forced upon them by competition.

XVIII.

The Increase of 2 Cents Per Hundred Pounds Made Effective April 15, 1903, was Justified by the Change in the Condition of the Lumber Market.

Appellants insist that said increase of 2 cents per hundred pounds is satisfactorily explained, and fully justified by the fact that the rates previously charged by them were, for a number of years, materially affected by a serious depression, which, during that period, existed in the lumber market, and which compelled appellants to reduce their rates during that period, in order to enable the lumber from Mississippi territory to continue in the market north of the Ohio River, at the depressed prices.

The majority report and opinion (Trans., Vol. II, p. 970), said:

"During the period from January, 1892, to September, 1903, there were many variations in the Chicago prices. They appear to have been lowest from 1895 to 1899, both inclusive."

On the hearing before the Commission, Mr. C. B. Compton prepared as exhibit "B" to his testimony a statement showing the prices of yellow pine lumber in the Chicago market, and also showing the freight rates from L. & N. R. R., Group 2 (M. & M. Division).

Trans., Vol. II, pp. 863, 864, 865.

It shows the rates, as they existed from time to time, and the prices of lumber as they existed during the same time; and it shows that the rates from L. & N. R. R. Group 2 to Chicago were kept in line, substantially, with the market prices of lumber at Chicago.

Said Exhibit shows the prices of lumber by three grades, viz., "A," "B," and "C." Grade "A" includes 1st and 2d flooring; grade "B," common flooring; and grade "C," three-inch dimension and timber under 12 x 12 x 30.

While the prices of said three grades of lumber have not been averaged in the exhibit filed by Mr. Compton, the average prices have, for the purposes of the comparison about to be instituted, been calculated, and said averages will be referred to as the "average price of lumber" on the Chicago market.

Said exhibit shows that the average price of lumber in

Chicago during the first quarter of 1892 was from $19.00 to $20.50 per thousand feet; while the rate on flat cars from L. & N. R. R. Group 2 to Chicago was 28 cents per hundred pounds.

It shows that the average price of lumber in Chicago fell from $19.00-$20.50 per thousand feet in the first quarter of 1892 to $17.00-18.50 in the third quarter of 1893; and that the rate on flat cars on July 16, 1893, was reduced from 28 cents to 27 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 27 cents from July 16, 1893, until May 10, 1894; and that the average price of lumber in Chicago had fallen from $17.00-$18.50 in the third quarter of 1893 to $14.50-$16.00 on May 10, 1894, when the rate on lumber in flat cars was reduced from 27 to 25 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 25 cents from May 10, 1894, to May 20, 1897; that the average price of lumber in Chicago had fallen from $14.50-$16.00 to $13.00 in the second quarter of 1897, when the rate on lumber in flat cars was reduced from 25 cents to 22 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued at 22 cents from May 20, 1897, to September 8, 1899; that the average price of lumber in Chicago had advanced from $13.00 in the second quarter of 1897 to $19.00-$20.00 in the fourth quarter of 1899, when the rate on lumber in flat cars was increased from 22 to 23 cents per hundred pounds.

It shows that the rate on lumber in flat cars continued

at 23 cents from September 8, 1899, to January 1, 1900; that the average price of lumber in Chicago increased from $19.00-$20.00 in the fourth quarter of 1899 to $19.50-$20.75 in the first quarter of 1900, when the rate on lumber in flat cars was increased from 23 to 24 cents per hundred pounds.

It shows that the rate of 24 cents continued in effect from January 1, 1900, up to the date of the increase of 2 cents per hundred pounds, which is the subject of complaint in this case.

Said last named increase was in contemplation during January, 1903.

Letter from T. C. Powell to T. J. Hudson, Trans., Vol. II, pp. 688, 689.

It will be seen that during the period from July 16, 1893, to June 22, 1903, both inclusive (a period of over nine years and ten months) said reductions and increases were as follows:

REDUCTIONS.

July 16, 1893	1 cent
May 10, 1894	2 cents
May 20, 1897	3 cents
Total	6 cents

INCREASES.

September 8, 1899	1 cent
January 1, 1900 (made by roads north of Ohio River)	1 cent.
June 22, 1903	2 cents
Total	4 cents

It will also be seen that the total increases during said period (including the increase of 2 cents complained of in this case) are less by 2 cents than the total reductions during the same period.

Said Exhibit "B" of Compton shows that during the period immediately preceding the suggested increase of 2 cents the prices of lumber had undergone a material increase over previous prices.

During the year 1902 the average price of lumber in Chicago, based upon Compton's Exhibit "B," was $20.00-$21.50, which average price exceeded the average price for any of the previous ten years.

Owing to the decreased demand for cars by railroad companies, during 1903, and owing to the business uncertainty incident to the Presidential election of 1904, the prices of lumber during said years declined.

Green, Trans., Vol. II, p. 119.
Bowes, Trans., Vol. II, p. 34.
Compton, Trans. Vol. II, p. 41.

It is shown, however, by Exhibit No. 4 to the deposition of C. B. Compton, filed in this cause, that the average price of grades "A," "B" and "C" in the Chicago market during the year 1905 was $22.25-$25.00; and it is also shown that during the third and fourth quarters of 1905 the average price of said grades in Chicago was $24.00-$28.00, which is about double the average price that prevailed in Chicago at the time of the establishment of the rate of 22 cents to Chicago in 1897, which rate is the lowest rate that has ever been in effect from L. & N. R. R. Group 2 stations to Chicago.

It is shown by Exhibit "D" to Mr. Bowes' testimony that the changes in rate adjustment from Mississippi territory to Chicago have corresponded substantially with those from L. & N. R. R. Group 2.

Bowes, Exhibit "D," Trans., Vol. II, p. 852.

Speaking generally, it is shown by the exhibits filed by Messrs. Compton and Bowes that, while the rates did not follow every fluctuation in prices, they did decrease with the general decrease in the price of lumber, and in that way assisted the sawmill men in Mississippi territory in meeting the depression in the lumber market.

In other words, the rates charged by appellants prior to said increase of 2 cents per hundred pounds were accepted by them, not as being reasonably high, but as being the highest they could secure under the depressed condition of the lumber market.

As hereinbefore shown, the prices of 1902 indicated that the depression had been relieved; and, as appellants had reduced their rates to meet said depression, it was entirely just and reasonable that they should be allowed to increase their rates as said depression became less and less.

In Re Proposed Advances in Freight Rates, 9 I. C. Rep., p. 386, Commissioner Prouty, who concurred in the majority opinion in this case, speaking of advances in iron rates, said:

"Where reductions have been made by reason of commercial depression, it is difficult to see why corresponding advances may not with propriety occur when that depres-

sion is relieved." . . . "If the railways reduced their rates during these periods at the solicitation of manufacturers, it seems no more than just that they should be permitted to raise them now, when the condition of that industry permits it."

And on page 439 of said opinion he said:

"Our conclusion as to the rates involved in this investigation is that, since the reduction in the iron schedule was the result of commercial conditions, that rate may have been properly increased, owing to the subsequent change in these conditions."

9 I. C. Rep., pp. 386, 439.

We insist that it was error of law for the Commission, and the Court, to refuse to apply, in this case, the rule of law which Commissioner Prouty recognized as just in the case last cited.

XIX.

The Increase of 2 Cents Per Hundred Pounds Made Effective April 15, 1903, or June 23, 1903, Was Justified, Because the Present Rates (Including Said Increase) Are Less Than Rates That Were in Force Prior to the Depression in the Lumber Market.

Appellants insist that even including said increase of 2 cents per hundred pounds made effective April 15, 1903, the present rates are less than rates that were in force prior to the period of depression in the lumber market.

To illustrate: Prior to said depression, the rates on

lumber in flat cars from stations on the Mobile & Montgomery and Pensacola Divisions of the L. & N. R. R. to Chicago were as follows, in cents per one hundred pounds:

From April 21, 1887, to May 28, 1887....40 cents
From May 28, 1887, to August 5, 1889....34 cents
From August 5, 1889, to July 16, 1893....28 cents
From July 16, 1893, to May 10, 1894....27 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds, made effective (by the L. & N. R. R.) June 22, 1903, is only 26 cents per hundred pounds.

Compton, Ex. V., Trans., Vol. II, pp. 892, 893.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds complained of, is not in reality an "advance" at all. It is from 2 to 14 cents less than any rate that was ever in force from May 10, 1894, back to April 11, 1887, which is as far back as the rates on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to May 10, 1894.

The testimony further shows that from stations on the Pensacola & Atlantic Division of the L. & N. R. R., to Chicago, the rates on flat cars were as follows in cents per one hundred pounds:

From January 1, 1887, to April 21, 1887..41 cents
From April 21, 1887, to May 28, 1887....40 cents
From May 28, 1887, to August 5, 1889....34 cents

From August 5, 1889, to July 16, 1893....31 cents
From July 16, 1893, to July 27, 1893....30 cents
From July 27, 1893, to May 10, 1894....29 cents
From May 10, 1894, to May 20, 1897....27 cents

The rate on flat cars from said stations to Chicago now in effect, including said increase of 2 cents per hundred pounds made effective June 22, 1903, is only 26 cents per hundred pounds.

Compton, Ex. V., Trans., Vol. II, pp. 892, 893.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds complained of, is not in reality an "advance" at all. It is from 1 to 15 cents less than any rate that was ever in force from said stations, from May 20, 1897, back to January 1, 1887, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Chicago prior to May 20, 1897.

The testimony further shows that from stations on the Pensacola & Atlantic Division of the L. & N. R. R., to Indianapolis, the rates on flat cars were as follows, in cents per one hundred pounds:

From May 2, 1887, to May 28, 1887.....38 cents
From May 28, 1887, to August 5, 1889....32 cents
From August 5, 1889, to July 16, 1893....30 cents
From July 16, 1893, to July 27, 1893....31 cents
From July 27, 1893, to May 10, 1894....30 cents
From May 10, 1894, to May 20, 1897....27 cents

The rate on flat cars from said stations to Indianapolis now in effect is only 25 cents per one hundred pounds.

Compton, Ex. V., Trans., Vol. II, pp. 892, 893.

In other words, the present rate on flat cars, including said increase of 2 cents per hundred pounds complained of, is not in reality an "advance" at all. It is from 2 to 13 cents less than any rate that was ever in force from said stations to Indianapolis from May 20, 1897, back to May 2, 1887, which is as far back as the rates now on file with the Interstate Commerce Commission will show. It therefore is not even a restoration of the rates that were in force from said stations to Indianapolis prior to May 20, 1897.

Mr. Bowes filed as Exhibit "D" to his testimony a statement showing a history of the rates on yellow pine lumber from the Illinois Central Railroad pine district in Southern Mississippi to various points on and north of the Ohio River.

Said Exhibit shows that the rates on flat cars from the Mississippi district to Cairo were as follows:

From April 20, 1889, to August 1, 1889.....22 cents
From August 1, 1889, to September 11, 1892..17 cents

The rate on flat cars from said Mississippi district to Cairo now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 16 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

Said Exhibit D further shows that the rates on flat cars from the Mississippi district to East St. Louis, Ill., were as follows:

From November 1, 1887, to August 1, 1889...26 cents
From August 1, 1889, to May 1, 1894.....20 cents

The rate on flat cars from said Mississippi district to East St. Louis, now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 20 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

Said exhibit further shows that the rate on flat cars from the Mississippi district to Chicago was as follows:

From April 20, 1889, to August 1, 1889..30 cents

The rate on flat cars from said Mississippi district to Chicago, now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 26 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

Said exhibit further shows that the rates on flat cars from the Mississippi district to Cincinnati were as follows:

From January 14, 1888, to October 4, 1891..27 cents

From October 4, 1891, to July 16, 1893.....26 cents

The rate on flat cars from said Mississippi district to Cincinnati, now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 23 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

Said exhibit further shows that the rates on flat cars

from the Mississippi district to Louisville were as follows:

From December 3, 1887, to March 9, 1892....25 cents
From March 9, 1892, to July 16, 1893.....23 cents

The rate on flat cars from said Mississippi district to Louisville, now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 21 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

Said exhibit further shows that the rates on flat cars from the Mississippi district to Evansville were as follows:

From March 17, 1888, to March 9, 1892..26 cents
From March 9, 1892, to July 16, 1893....23 cents

The rate on flat cars from said Mississippi district to Evansville, now in effect, including said increase of 2 cents per hundred pounds made effective by the I. C. R. R. on April 15, 1903, and which is the increase complained of, is only 22 cents per hundred pounds.

Bowes, Ex. D., Trans., Vol. II, p. 852.

In other words, the present rates on lumber in flat cars from the Mississippi district to Cairo, East St. Louis, Chicago, Cincinnati, Louisville and Evansville are not in reality "advances" at all. They are from 1 to 6 cents less than any of the rates above set forth as in effect between November 1, 1887, and May 1, 1894, with the exception that the present rate to East St. Louis is the same as the rate which was in effect between August 1, 1889, and May 1, 1894.

Mr. Compton filed as Exhibit "U" to his testimony a

statement showing the rates on lumber at present effective from Southern territory to Ohio River crossings, and also rates which have been effective from time to time to Ohio River crossings, and comparison of present rates with old rates. Said statement shows the average of the present rates to be less than a restoration of former rates.

Compton, Trans., Vol. II, pp. 287, 890, 891.

Mr. Compton testifies that the low rate prevailing from 1894 to 1899 from Southern territory to Cairo was a "distress rate," made to meet abnormal conditions, and that during said period the financial and commercial condition of the country was bad.

Compton, Trans., Vol. II, p. 288.

In Re Proposed Advances in Freight Rates, 9 I. C. Rep., p. 386, the Commission said:

"It is a matter of general information that between 1895 and 1900 the iron industry was much depressed, and the carriers now tell us that something of the same nature occurred in the winter of 1902. If the railways reduced their rates during these periods at the solicitation of manufacturers, it seems no more than just that they should be permitted to raise them now, when the condition of that industry permits it."

Re Proposed Advances in Freight Rates, 9 I C. Rep., p. 386.

In other words, although the period of depression was substantially the same with respect to the iron business as the period of depression with respect to the lumber business; and although the advance in the iron rates was in the

nature of a restoration of former rates, as was true of the advance in lumber rates; and although the only difference between the two cases was that one related to iron and the other to lumber, the Commission in the present case in effect held that, by reason of the "long continuance" of the former rates of 13 and 14 cents to Cairo, the present increased rate of 16 cents is unreasonable; while in the case involving rates upon iron, the "long continuance" of the lower rates upon iron from 1895 to 1900 did not operate to prevent the restoration of the former figures.

In the latter case, the Commission said:

"Where reductions have been made by reason of commercial depression, it is difficult to see why corresponding advances may not with propriety occur when that depression is relieved."

9 I. C. Rep., p. 386.

Inasmuch as the finding of the Commission that the present rate of 16 cents to Cairo is unreasonable is predicated entirely upon the theory that the "long continuance" of a lesser rate renders any higher rate unreasonable, and inasmuch as there is nothing in the testimony that goes to show the unreasonableness of the higher rate upon other grounds, the appellants insist that the principle of law laid down by the Commission in the case involving iron rates should govern in this case. The Commission made no attempt to differentiate the lumber rate case from the iron rate case.

We insist that it was error of law for the Commission, and the Court, to refuse to apply in this case the rule of law which the Commission recognized as just and proper in the case last cited.

XX.

The Increase of 2 Cents Per Hundred Pounds Made Effective April 15, 1903, Was Justified; Because the Percentage of Increase Has Been Greater in the Operating Expenses of the Intermediate Roads Which Receive Said Increase Than in the Rates on Lumber.

The Commission, in speaking of through rates from Mississippi territory to points north of the Ohio River, said:

"As before stated, the roads north of the Ohio charge their full local rates from the Ohio River to the lumber markets in Central Freight Association Territory, as their proportions of the through rates."

Trans., Vol. II, p. 964.

The Commission found that the principal "originating roads"—i. e., roads on which the lumber traffic originates—are the Gulf & Ship Island Railroad, extending from Gulfport to Jackson, and the New Orleans & Northeastern Railroad, extending from New Orleans to Meridian.

Trans., Vol. II, p. 964.

The "intermediate roads," which connect at Jackson and Meridian with the Gulf & Ship Island Railroad, and with the New Orleans & Northeastern Railroad, and which continue the transportation northward from Jackson and Meridian to the Ohio River, are the Illinois Central Railroad, the Mobile & Ohio Railroad, and the Alabama Great Southern Railroad.

Trans., Vol. II, p. 964.

In its report and opinion, the Commission finds that the increase of 2 cents complained of goes entirely to the roads leading from Jackson and Meridian to the Ohio River, and none of it to the originating roads.

Trans., Vol. II, p. 995.

The increase of 2 cents complained of in this case was, as stated in said report and opinion (Trans., Vol. II, p. 964), made effective on April 15, 1903, by all the roads except the L. & N. R. R.; and from that date back to September 8, 1899, said "intermediate roads" charged rates which were only 2 cents per hundred pounds less than those made effective on April 15, 1903. No complaint has ever been made of the rates charged by said "intermediate roads" between September 8, 1899, and April 15, 1903.

Appellants aver that said rates which were charged by said "intermediate roads" between September 8, 1899, and April 15, 1903, were low; that the operating expenses of said "intermediate roads" properly attributable to freight traffic, increased between September 8, 1899, and April 15, 1903, by a greater per cent than the rates on lumber increased between the same dates; and they insist that under those circumstances the said increase or so-called advance of 2 cents per hundred pounds made on April 15, 1903, was fully justified.

Smith & Forrest v. L. & N. W. Ry. Co. et al., XI Ry. & Canal Traf. Cas., p. 156.

We submit herewith the following table, compiled from the Statistics of Railways in the United States, published by the Interstate Commerce Commission, for the fiscal year ending June 30, 1900 (which includes September 8, 1899); and for the fiscal year ending June 30, 1903 (which includes April 15, 1903).

Said table is as follows:

Name of Railroad		Gross earnings from operation		Total operating expenses	Percentage of total operating expenses to gross earnings from operation		Total freight earnings [including stockyards, elevators and miscellaneous]	otal operating expenses properly attributable to total freight earnings [including stockyards, elevators and miscellaneous]		Total mileage operated	Total operating expenses per mile of road operated properly chargeable to total freight	Perc'n't'ge of incr'se in 1903 over 1900 in total operat'g expenses per mile of road operat'd, properly chargeable to total freight
1900												
Illinois Central R. R. Co...	(387)	$32,611,967	(457)	$21,377,615	65.55	(387)	$22,335,234	$14,640,745	(250)	3,996	$ 3,664	
Southern Railway Co.....	(387)	31,166,282	(457)	20,749,068	66.58	(387)	21,006,730	13,986 280	(250)	6,431	2,175	
Mobile & Ohio R. R. Co...	(387)	5,503.517	(457)	4,185.757	76.06	(387)	4,544,436	3,456,498	(250)	876	3,946	
Ala. Great Southern R. R.	(363)	2,030,481	(445)	1,313,530	64.70	(363)	1,400,033	905,821	(204)	310	2,922	
C. N. O. & T. P. Ry. Co ...	(361)	5,114,624	(443)	3,482.397	68.09	(361)	3,947,140	2,687,607	(196)	338	7,952	
L. & N. R. R. Co.	(387)	28,451,746	(457)	19,065,722	67.01	(387)	21,286,647	14,264,182	(250)	3.234	4,410	
1903												
Illinois Central R. R. Co..	(405)	45,186 077	(473)	29,835,883	66 03	(405)	30,716,922	20,282,383	(272)	4,301	4,716	28.7
Southern Railway Co	(405)	42,338,248	(473)	29.786.06'	70.35	(405)	28,081,034	19,755,007	(272)	7,137	2.768	27.2
Mobile & Ohio R. R. Co ...	(405)	6,836,629	(473)	5,077,311	74 27	(405)	5,702,967	4,235,593	(272)	874	4,846	22.8
Ala. Great Southern R. R.	(381)	2,670,646	(462)	1,900,748	71.17	(381)	1,747.925	1,243,998	(222)	309	4,026	37.7
C. N. O. & T. P. Ry. Co ...	(379)	6,153,580	(461)	4,431.571	72 02	(379)	4,681,877	3,371,887	(216)	338	9.976	25 4
L. & N. R. R. Co.....	(405)	35,568,483	(473)	24,051,928	67.62	(405)	26,656,249	18,024,955	(272)	3,491	5,163	17.

Figures prefixed in parentheses refer to pages of Statistics of Railways in the United States for the years named.

It will be seen that the total operating expenses, per mile of road operated, properly attributable to total freight earnings (including stock yards, elevators and miscellaneous) increased between September 8, 1899, and April 15, 1903, as follows:

On the Illinois Central R. R.....28.7 per cent
On the Southern Railway.....27.2 per cent
On the Mobile & Ohio Railroad.....22.8 per cent
On the Alabama Great Southern R. R..37.7 per cent
On the C., N. O. & T. P. Ry.....25.4 per cent
On the L. & N. R. R.....17 per cent

Between September 8, 1899, and April 15, 1903, the rates on lumber from Southern Mississippi to Cairo, Ill., increased from 14 cents to 16 cents per hundred pounds, which is an increase of only 14.3 per cent.

Cairo is selected as an Ohio River point for the reason that practically all the rates to points north of the Ohio River base on Cairo; and for the further reason that, Cairo taking the lowest rate of all the Ohio River points, the increase of 2 cents per hundred pounds constitutes a greater percentage of the former rate to Cairo than it constitutes of the former rate to any other Ohio River point.

We insist that it was error of law for the Commission, and the Court, to refuse to give the legal weight to which it is entitled, to the fact that the percentage of increase has been greater in the operating expenses of the "intermediate roads" than in the rates on lumber.

XXI.

THE INCREASE IN APPELLANTS' OPERATING EXPENSES IS NOT DUE ALONE TO INCREASED MILEAGE.

The majority report and opinion (Trans., Vol. II, p. 975) said:

"The operating expenses of the carriers have constantly grown larger, but the total annual increases in operating expenses are due, mainly, to the constant growth or enlargement of the business of the roads. This growth in business has resulted from the larger mileage operated, the development and increased prosperity of the country traversed by the roads and from advancement in methods of operation and additions to and improvements in equipment of all kinds. The business of the roads, or the tonnage of traffic transported by them, not only in the item of lumber, as heretofore shown, but also in traffic generally, has grown to a most material extent."

Trans., Vol. II, p. 975.

Said report and opinion commits an error of fact when it states, in effect, that the increase in operating expenses is due to any material extent to the larger mileage operated. The "Statistics of Railways in the United States," for the years 1901, 1902 and 1903, respectively, published by the Interstate Commerce Commission, show the operating expenses and the mileage of each of appellants for each of said years, and a computation therefrom demonstrates that the percentage of increase of appellants' operating expenses was very much greater than the percentage of increase in appellants' mileage during that period.

It will be seen from said computation that the increase in operating expenses in 1902 over 1901 was 10.47 per cent; while the increase in mileage was only 1.05 per cent.

It will also be seen that the increase in operating expenses in 1903 over 1902 was 14.66 per cent; while the increase in mileage was only 2.62 per cent.

Said computation is as follows:

Name of Railroad	Operating Expenses			Mileage Operated		
	1901	1902	1903	1901	1902	1903
Illinois Central Railroad	(1) $ 24,251,678	(10) $26,248,123	(19) $29,835,883	(1) 4,265	(10) 4,283	(19) 4,301
Gulf & Ship Island Railroad	(2) 701,560	(11) 921,829	(20) 1,051,687	(2) 253	(11) 251	(20) 251
Southern Railway Company	(3) 23,275,304	(12) 25,025,444	(21) 29,786,069	(3) 6,728	(12) 6,765	(21) 7,136
Mobile & Ohio Railroad	(4) 4,186,505	(13) 4,348,241	(22) 5,077,311	(4) 874	(13) 874	(22) 874
N. O. & N. E. R. R.	(5) 1,396,373	(14) 1,431,375	(23) 1,592,005	(5) 195	(14) 195	(23) 195
Alabama Great Southern Railroad	(6) 1,396,840	(15) 1,602,884	(24) 1,900,748	(6) 309	(15) 309	(24) 309
C. N. O. & T. P. Ry. Co	(7) 3,533,784	(16) 4,012,854	(25) 4,431,571	(7) 338	(16) 338	(25) 338
Alabama & Vicksburg Railway	(8) 657,238	(17) 735,525	(26) 818,966	(8) 143	(17) 143	(26) 143
Louisville & Nashville Railroad	(9) 18,396,919	(18) 21,018,588	(27) 24,051,928	(9) 3,325	(18) 3,444	(27) 3,491
Total	$77,796,201	$85,944,843	$98,546,168	16,450	16,602	17,038

Increase in operating expenses 1902 over 1901 ..... $ 8,148,642 = 10.47 per cent
Increase in operating expenses 1903 over 1902 ..... 12,601,325 = 14.66 per cent
Increase in mileage 1902 over 1901 ..... 172 miles = 1.05 per cent
Increase in mileage 1903 over 1902 ..... 436 miles = 2.62 per cent

Statistics Rys. 1901	Statistice Rys. 1902	Statistics Rys. 1903	Statistics Rys. 1901	Statistics Rys. 1902	Statistics Rys. 1903
(1) p. 461	(10) p. 467	(19) p. 473	(1) p. 264	(10) p. 268	(19) p. 272
(2) p. 447	(11) p. 455	(20) p. 461	(2) p. 212	(11) p. 210	(20) p. 218
(3) p. 461	(12) p. 467	(21) p. 473	(3) p. 264	(12) p. 268	(21) p. 272
(4) p. 461	(13) p. 467	(22) p. 473	(4) p. 264	(13) p. 268	(22) p. 272
(5) p. 448	(14) p. 456	(23) p. 462	(5) p. 216	(14) p. 214	(23) p. 220
(6) p. 448	(15) p. 456	(24) p. 462	(6) p. 218	(15) p. 216	(24) p. 222
(7) p. 447	(16) p. 455	(25) p. 461	(7) p. 210	(16) p. 208	(25) p. 216
(8) p. 447	(17) p. 455	(26) p. 461	(8) p. 208	(17) p. 206	(26) p. 212
(9) p. 461	(18) p. 467	(27) p. 473	(9) p. 264	(18) p. 268	(27) p. 272

Figures prefixed in parentheses refer to citations at foot of statement.

XXII.

Permanent Improvements and Equipment Are Properly Chargeable to Operating Expenses.

The majority report and opinion in this case said:

"It is to be noted, that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements, and also for equipment such as locomotives and cars. While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years."

Trans., Vol. II, pp. 995, 996.

In the case of H. H. Tift et al. v. Southern Ry. Co. et al., 10 I. C. Rep., 584, the Commission said:

"There was a long period of business depression in the South, during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper or first-class condition. When that period passed away, unusual expenditures were required for new engines, new car equipment, the replacing of worn-out rails, and in other ways necessary to put the roads in proper condition and enable them to handle their largely increased business. As these expenditures were included in the operating expenses reported by the roads, the latter became

exceptionally large, reaching a percentage of gross earnings which it is not probable will be maintained in the future."

We insist that it was error of law for the Commission and the Court to hold that the cost of permanent improvements and equipment is improperly charged to operating expenses. The question was before this Court in 99 U. S., 420, 421, U. P. R. R. Co. v. U. S. In that case this Court said:

"Some charge to construction account every item of expense, and every part and portion of every item which goes to make the road or any of its appurtenances or equipment better than they were before, whilst others charge to ordinary expense account and against earnings whatever is taken for these purposes from the earnings and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness."

Where, as in this case, the cost of permanent improvements and equipment is charged to operating expenses, it is necessarily deducted from the gross earnings, before the net earnings can be ascertained; and, therefore, the cost of appellants' permanent improvements and equipment "is not raised upon bonds or issues of stock."

In other words, in charging the cost of permanent improvements and equipment to operating expenses, the very method has been adopted by the appellants which this Court says is deemed the most conservative and beneficial to the company and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness.

It is true that there was a long period of business depression in the South, during which the appellants not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper condition. It is also true that when that period of business depression passed away, appellants were compelled to expend unusual amounts for new engines, and cars, and for replacing worn-out rails necessary to put the roads in proper condition, so as to enable them to handle their largely increased business. But if, during said period of business depression, appellants were not financially able to expend amounts sufficient to maintain their roads in proper condition, it was their duty, when said period of depression passed away, to spend such amounts in the improvement of their roads and equipment as they should have spent during the period of depression, if they had the necessary funds at their command.

In considering the justness and reasonableness of the increase of 2 cents per hundred pounds in the lumber rates, the Commission and the Court should give precisely the same consideration to the fact that large sums of money have been expended by appellants in putting their roads in proper condition since said period of depression, as they would have given if said expenditures had been made during said period. The important fact is that during said period of depression and since, appellants have been compelled to expend, in the aggregate, a very large amount of money to get their roads into proper condition; and the fact that those large sums of money had to be expended, justified the appellants in endeavoring to raise some portion of it by increasing the rates on lumber and such other commodities as it was believed would bear the increases that have been

made, without entailing any material injury upon the shippers of said commodities.

In the majority report and opinion in this case, the Commission said:

"The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like expenditures, or expenditures to the same extent, for many years to come; and the extraordinary amount of such expenditures made by the defendants in a few years preceding and including the year of the advance in rate indicates that they will not be required again for a long period of time. They should not, therefore, be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'"

Trans., Vol. II, p. 996.

If it was right to charge the cost of permanent improvements and equipment to "operating expenses," as said by this Court in 99 U. S., 420, 421, referred to above, appellants could not have "projected said expenditures proportionately over the future," unless they had made false entries in their books, by failing to charge in each year all the operating expenses of that year, and by charging hereafter, in future years, expenditures which will not be actually made in those years. If it be said, however, that said expenditures could be "projected proportionately over the future," by issuing bonds and stocks to represent them, appellants would do exactly what this Court in the case cited said that a railroad company ought not to do.

XXIII.

Lumber Was Not Selected by Appellants to Meet the Entire Increase in Their Operating Expenses.

In the case of H. H. Tift et al. v. Southern Railway Co. et al., 10 I. C. Rep., 585, 586, the Commission said:

"The principal ground urged (for making said advance of 2 cents per hundred pounds) is that additional revenue was needed to meet increased expenses, and that, in the language of one of the principal witnesses of defendant, they 'looked around to see where they could best get that additional revenue, and one of the commodities which they thought would bear the advance was lumber."

The object of the Commission in the Tift case seems to have been to create the impression that lumber was selected by the appellants in that case to bear the entire, or almost the entire, increase in operating expenses.

In the report and opinion of the majority of the Commission in the present case (Trans., Vol. II, pp. 969, 970), the Commission enters into certain calculations to show that on lumber from Mississippi and East Louisiana alone the increase of 2 cents per hundred pounds amounts to $1,026,600 per annum.

An inspection of the statistics of actual movement filed by the Illinois Central Railroad, the Mobile & Ohio Railroad and the Southern Railway discloses that those companies have not, upon the traffic which is involved in the com-

plaint, succeeded in augmenting their revenues by any such amount as $1,026,600, or anything approaching it. The purpose of the calculations made by the Commission in this case was doubtless to leave the impression that the burden of the increased cost of operation of railways had been placed almost, if not entirely, upon the lumber traffic.

It is shown by the Preliminary Report on Income Account of Railways in the United States for the years 1902 and 1903, that the operating expenses of the Illinois Central Railroad Company in 1902 were $26,248,123; and that in 1903 the operating expenses of said company were $29,835,883, an increase of $3,587,760.

It is shown by Mr. Bowes' Exhibit "C" (Trans., Vol. II, pp. 850, 851) that the total number of cars of pine lumber shipped via the I. C. R. R. through Cairo and Mounds, Ill., for the year 1903 was 19,846. In its majority report and opinion (Trans., Vol. II, p. 969), the Commission finds that the increase amounts to $8.70 per car; and upon said 19,846 cars the increase of revenue to the I. C. R. R. would have been only $172,660, as against an actual increase in operating expenses of $3,587,760.

It is shown by Mr. Green's Exhibit No. 3 (Trans., Vol. I, p. 327) that the total number of cars of pine lumber shipped via the Southern Railway to points on and north of the Ohio River from Alabama, Mississippi and Eastern Louisiana during the year 1903 was 4,632. In its majority report and opinion (Trans., Vol. II, p. 969), the Commission finds that the increase amounts to $8.70 per car; and upon said 4,632 cars the increase of revenue to the Southern Railway Company would have been only $40,298, while the actual increase

in operating expenses of the Southern Railway in 1903 over 1902 was, as shown by said Preliminary Report on Income Account, $4,160,625.

It is shown by the testimony of Mr. Haiden Miller (Trans., Vol. I, p. 153) that the total number of tons of pine lumber shipped via the M. & O. R. R. to points on and north of the Ohio River during the year 1903 was 531,211. The increase of 2 cents per hundred pounds represents 40 cents per ton, and, therefore, if said 531,211 tons shipped via the M. & O. R. R. had paid the increased rate, the increase in revenue to the company would have been $212,484; while the actual increase in operating expenses of the M. & O. R. R. in 1903 over 1902 was, as shown by said Preliminary Report on Income Account, $729,090.

It is shown by the testimony of Mr. C. B. Compton, Ex. No. 3 (Trans., Vol. I, p. 309), that the total number of pounds of lumber shipped via the L. & N. R. R. from producing points south of Birmingham to Ohio River points and beyond during the year 1903 was 379,944,307. The increase of 2 cents per hundred pounds upon this quantity of lumber would have amounted to $75,988; while the actual increase in operating expenses of the Louisville & Nashville Railroad in 1903 over 1902, as shown by said Preliminary Report on Income Account, was $3,030,873.

It is thus shown beyond a reasonable doubt that lumber has not been singled out to bear the burden of increased operating expenses, and that it is in reality bearing a remarkably small part of such increased expenses.

XXIV.

The Fact That Appellants' Net Earnings, as Well as Their Gross Earnings, Have Increased is Not Material.

An examination of said Preliminary Report on Income Account, referred to in Section XXIII., discloses a somewhat remarkable condition as regards the increase in gross and net earnings of the appellants.

In 1902 the gross earnings of the Illinois Central Railroad were $40,821,030; in 1903, $45,186,077; increase, $4,365,047. The increase in net earnings, however, in 1903 over 1902 was only $777,287. In other words, the increase in gross earnings yielded only about 16 per cent of the amount as net; whereas gross earnings ordinarily yield about 30 per cent net.

In 1902 the gross earnings of the Southern Railway were $37,701,673; in 1903, $42,338,248; increase, $4,636,575. The increase in net earnings, however, in 1903 over 1902 was only $475,950, or about 10 per cent of the increase in gross earnings; whereas gross earnings ordinarily yield about 30 per cent net.

In 1902 the gross earnings of the C., N. O. & T. P. Ry. were $5,649,651; in 1903, $6,153,580; increase, $503,929. The increase in net earnings, however, in 1903 over 1902 was only $85,212, or less than 16 per cent of the increase in gross earnings; whereas gross earnings ordinarily yield about 30 per cent net.

In 1902 the gross earnings of the Alabama Great Southern Railroad were $2,401,655; in 1903, $2,670,646; increase, $268,991. *The net earnings, however, in* 1903 *showed a decrease as compared with* 1902 *of* $28,873.

In 1902 the gross earnings of the M. & O. R. R. were $5,973,240; in 1903, $6,836,629; increase, $863,389. The increase in net earnings, however, in 1903 over 1902 was only $134,299, or less than 16 per cent of the increase in gross; whereas gross earnings ordinarily yield about 30 per cent net.

On the L. & N. R. R. conditions were more nearly normal.

Counsel for the appellee filed in the Circuit Court a statement showing the financial results of operation during 1905 as compared with 1903, for the purpose of showing that, notwithstanding the increase in cost of maintenance and operating expenses of the appellants, their net as well as gross earnings have also increased.

Inasmuch as the purpose of the increase in lumber and other rates in 1903 was to bring about an increase in the net earnings of the appellants, it is not surprising that the statement filed by counsel for the appellee should show that result; but it is surprising how slight the increase in net earnings has been, considering the increase in the gross earnings.

For instance, said statement shows that the gross earnings of the Illinois Central Railroad, south of Cairo, increased in 1905 over 1903 by $2,663,256; while the net earnings of said company increased only $145,181.

In Mr. Bowes' Exhibit C-1 (Trans., Vol. I, pp. 284, 285) it is shown that the total number of carloads of lumber moved via the I. C. R. R. through Cairo and Mounds, from Mississippi and Eastern Louisiana during the year 1905, were 21,730. At $8.70 per car, the increase in revenue on said traffic was $189,051 over what the I. C. R. R. would have received at the old rate. The increase in net earnings of $145,181 shown in said statement would, therefore, have been converted into a decrease had not the Illinois Central Railroad been enabled to charge the present rates upon lumber and other commodities.

Said statement shows that the gross earnings of the L. & N. R. R. south of the Ohio River increased in 1905 over 1903 by $2,694,034; while the net earnings of said company increased only $195,602.

In Mr. Compton's Exhibit No. 3 (Trans., Vol. I, p. 310) it is shown that the total number of pounds of lumber moved via the L. & N. R. R. from producing points south of Birmingham to Ohio River points and beyond during the year 1905 was 535,693,119. The increase of 2 cents per one hundred pounds upon this amount of lumber represents $107,138. If the L. & N. R. R. Co. had been deprived of this revenue, its increase in net earnings in 1905 over 1903 would have been only $88,464, notwithstanding an increase in gross earnings of more than two and one-half million dollars.

Said statement shows that the gross earnings of the Southern Railway Company, line west of Virginia and Carolinas, increased in 1905 over 1903 by $1,937,967; while the net earnings of said company increased $295,465.

It is shown in Mr. Green's Exhibit No. 3 (Trans., Vol. I, p. 348) that the total movement via the Southern Railway to points on and beyond the Ohio River during 1905 was 9,889 cars. At $8.70 per car, the increase in revenue on said traffic was $86,034 over what the Southern Railway would have received at the old rate. Had the Southern Railway not been enabled to charge its present rates on lumber and other commodities, but been compelled to charge the former rates, the increase in its net earnings in 1905 over 1903, instead of being $295,465, would have been only $209,431, and the increase in net would have been about 11 per cent of the increase in gross earnings; whereas gross earnings ordinarily yield about 30 per cent.

Said statement shows that, while the gross earnings of the Alabama Great Southern Railroad increased in 1905 over 1903 by $571,130, *the net earnings of said company actually decreased* $79,161.

Said statement shows that the gross earnings of the Mobile & Ohio Railroad Company increased in 1905 over 1903 by $863,109, and that the net earnings also increased by the substantial amount of $432,639; but this favorable showing would have been materially impaired had not the M. & O. R. R. been enabled to charge its present rates upon lumber and other commodities.

Mr. Haiden Miller testified (Trans., Vol. I, p. 153) that the total movement of lumber via the M. & O. R. R. to Ohio River points and beyond during the year 1905 was 537,118 tons. Upon this quantity of lumber the increase of 2 cents per one hundred pounds represents $214,847. Had the M. & O. R. R. been deprived of this revenue, the increase in its net earnings in 1905 over 1903 would have been only $217,792.

On the whole, the statement filed by counsel for the appellee demonstrates how very necessary the increase in rates on lumber and other commodities was.

In the present case, and in the Tift case, 10 I. C. Rep., 548, and In Re Proposed Advances in Freight Rates, 9 I. C. Rep., 382, the Commission has, in substance, held that, although the profit of a railway upon a single transaction of carriage may have been greatly diminished because of increased operating cost, yet if, by reason of the multitude of transactions incident to increased volume of business, the net earnings of the carrier as a whole continue to increase, rates cannot be so increased as to maintain the former reasonable profit upon the single transaction.

This doctrine, which is an invention of the Commission, has nothing to support it; it constitutes error of law upon the part of the Commission, and the Court, because it is in conflict with the opinion of this Court in the case of Cotting v. Kansas City Stock Yards, 183 U. S., p. 95, viz.:

"Pursuing this thought, we add that the State's regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because, by reason of the multitude, the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered."

Cotting v. K. C. Stock Yards Co., 183 U. S., p. 95.

XXV.

It Was Proper for the Intermediate Roads Leading North From Jackson and Meridian to the Ohio River to Increase Their Proportions, by Increasing the Total Through Rates.

In its majority report and opinion, Trans., Vol. II, p. 995, the Commission said:

"If the allowances to the originating roads are unreasonably large, as they appear to be *from a distance standpoint*, and result in unreasonably low proportions to the other roads, this cannot be remedied by an advance in the total through rates charged to the public."

It will be noted that the Commission in reaching the conclusion that the allowances to the originating roads are unreasonably large predicates its conclusion entirely upon the matter of distance.

The Gulf & Ship Island Railroad is the principal originating road in the lumber producing section of Mississippi.

Its tonnage of lumber varies from 70 to 77 per cent of its whole business.

Hale, Trans., Vol. I, p. 211.

It would not have been built without the assurance of a greater per ton, per mile, rate than the trunk lines, such as the M. & O. R. R. and I. C. R. R. were enjoying.

Hale, Trans., Vol. I, p. 211.

Mr. Gee, Auditor of the Gulf & Ship Island Railroad, estimates that if 2 cents per hundred pounds should be subtracted from the revenue of the Gulf & Ship Island Railroad on lumber destined to Ohio River points and beyond, and given to its connections for the purpose of increasing their proportions, the annual loss to the Gulf & Ship Island Railroad would be in round numbers $200,000 per annum.

Trans., Vol. I, pp. 190, 191.

Mr. Gee testifies that if $200,000 were deducted from the total income of the Gulf & Ship Island Railroad for the year ending June 30, 1903, the remainder of the income would pay a rate of 6 per cent per annum upon a capitalization of only $30,350.49 per mile.

Trans., Vol. I, p. 191.

Mr. Gee further testifies that the cost per mile of the Gulf & Ship Island Railroad on June 30, 1903, was $40,-394.72.

Gee, Trans., Vol. I, p. 197.

Upon said valuation of $40,394.72 per mile, the remainder of income for the year ending June 30, 1903, after deducting said $200,000, would have paid only 4.5 per cent.

The lawful rate of interest in the State of Mississippi is 6 per cent, and the conventional rate may be as high as 10 per cent.

Gee, Trans., Vol. I, p. 187.

It thus appears that while the sacrifice of $200,000 revenue annuallly would not bankrupt the Gulf & Ship Island Railroad, it would have the effect to reduce its interest re-

turn below that realized upon other investments or enterprises.

Mr. Steele testified that if 2 cents per hundred pounds should be subtracted from the proportions of the N. O. & N. E. R. R. on all lumber business to Ohio River points and beyond, on which said road receives 6 cents per 100 pounds, the loss in revenue per annum on basis of actual movements would show as follows:

1902	$94,451
1903	90,759
1904	53,568
1905	59,613

Steele, Trans., Vol. I, pp. 266, 267.

Mr. Steele further testifies that from 1889 to 1903 inclusive the N. O. & N. E. R. R. paid no dividends; and that in the fiscal year 1903-4 paid a 3 per cent dividend of $180,000; and in 1904-5 it paid the same dividend.

Steele, Trans., Vol. I, p. 267.

Mr. Steele further testifies that if the revenues of the N. O. & N. E. R. R. upon its lumber traffic had been curtailed by giving up 2 cents per hundred pounds to its connections the N. O. & N. E. R. R. would not have been able to pay the two dividends which it did pay of 3 per cent each.

Steele, Trans., Vol. I, p. 267.

It thus clearly appears that neither of the originating roads, viz., the Gulf & Ship Island or the N. O. & N. E. R. R., is in such financial condition that it can, as suggested by the Commission, remedy the unreasonably low propor-

tions accruing to the trunk lines by giving them 2 cents of the present revenue of the originating line.

If the Commission had possessed jurisdiction over the divisions of the through rates, and had issued an order compelling the Gulf & Ship Island and the N. O. & N. E. R. R. to sacrifice 2 cents of their revenue to the "intermediate roads," such an order would have been confiscatory in its character and therefore void; and it would not have mattered that such order might have been only partially or slightly confiscatory.

124 Fed. Rep., 602 Spg. V. Waterworks v. San Francisco.

In the majority report and opinion (Trans., Vol. II, p. 965) it is said:

"Out of the balance of the 16-cent rate to Cairo, to wit, 9 cents left the Illinois Central road for the haul from Jackson to Cairo, a distance of 366 miles, comes the bridge toll of 2 cents at Cairo, leaving a net rate of 7 cents, which amounts to 3.8 mills per ton per mile."

Mr. Haiden Miller testified that the average rate per ton per mile earned by the M. & O. R. R. on all lumber—i. e., from connections as well as originating on its own line—is 3.8 mills.

Trans., Vol. II, p. 386.

In its majority report and opinion (Trans., Vol. II, p. 965) the Commission finds said rate per ton per mile of 3.8 mills accruing to the I. C. R. R. to be "small."

Prior to the increase of 2 cents per hundred pounds, the

net rate which accrued to the I. C. R. R. between Jackson and Cairo was 5 cents, instead of 7 cents, as at present; and said proportion of 5 cents yielded a rate per ton per mile of only 2.7 mills. Of course, if a rate per ton per mile of 3.8 mills is "small," as found by the Commission, the former rate per ton per mile of 2.7 mills was exceedingly low. Yet the Commission, toward the close of its opinion, says:

"Those allowances commenced under the lower rates in force prior to the advance and raise the presumption that those lower rates, minus the allowances, were then considered reasonably remunerative for the remainder of the hauls to the Ohio River crossings."

Rep. & O., Trans., Vol. II, p. 995.

The presumption that the 2.7 mills yielded by the former rate was "reasonably remunerative" is not only preposterous, but in conflict with the finding of the majority of the Commission in the earlier part of its opinion that the rate of 3.8 mills yielded by the present rate is "small."

In Chapter IX of this argument, the average rate per ton per mile accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati on lumber originating in Mississippi territory, and destined to representative markets of consumption in territory north of the Ohio River, was stated to be 5.59 mills per ton per mile. In said chapter said 5.59 mills was compared with twelve other rates per ton per mile yielded by lumber rates charged in Texas, New Mexico, Kansas, Arkansas, Missouri, Minnesota, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania and New York, and shown to be lower than many interstate rates on lumber charged between points in said States.

Although said average rate per ton per mile of 2.7 mills which accrued to the I. C. R. R. out of former rates as its share between Jackson and Cairo, is less than half of said 5.59 mills accruing to the lines south of Cairo, Evansville, Louisville and Cincinnati, and although all of said rate comparisons were introduced in evidence on the hearing before the Commission, the Commission does not hesitate to say that the presumption is that the rate of 2.7 mills was considered "reasonably remunerative for the remainder of the hauls to the Ohio River crossings."

Trans., Vol. II, p. 945.

We insist that it was error of law for the Commission, and the Court, to predicate their action upon any such presumption.

XXVI.

The Rate on Lumber May Be Somewhat Remunerative and Yet Be Unreasonably Low.

In the majority report and opinion of the Commission (Trans., Vol. II, p. 987) it is said:

"Conceding, however, for argument's sake, that the lumber business had, at the date of the advance, become phenomenally prosperous and remunerative, this could not justify an advance of a rate already reasonably high."

The argument ignores the difference between a rate that is barely remunerative and one that is reasonably remunerative.

In what are known as the "long-and-short-haul cases"

it has repeatedly been argued on behalf of the Commission that a rate to a longer distance competitive point must be assumed to be remunerative, or the carriers would not accept it; and that, if that rate be remunerative, a higher rate to a shorter distance point must necessarily be unreasonably high. The Commission overlooks the fact that while the rate to the farther distant competitive point may pay something over the cost of movement of the longer distance competitive traffic, it may not pay, and frequently does not pay, anything like a *reasonable* remuneration upon that traffic.

In the case of Smyth et al. v. Ames et al., this Court quoted the following from Justice Brewer:

"It must be remembered that these roads are competing roads; that competition tends to a reduction of rates—sometimes, as the history of the country has shown, *below that which affords any remuneration to those who own property.*"

169 U. S., p. 542, Smyth et al. v. Ames et al.

Therefore this Court has never allowed the fact that the longer distance competitive rate pays something more than the cost of movement of the longer distance competitive traffic (and is, therefore, to some extent remunerative) to avail as an argument that the higher rate for the shorter distance traffic is unreasonably high.

Yellow pine lumber manufactured in Mississippi territory may be moved by various competing lines to New York and other North Atlantic cities, or it may be moved by various competing vessels to Europe; or it may be moved, as in

this case, by various competing roads to points on and north of the Ohio River; and when moved to points on and north of the Ohio River it comes into competition with white pine, spruce and hemlock from Canada and the Northern States, with fir from the Pacific coast, and with yellow pine from Georgia territory and Arkansas territory.

It is manifest, therefore, that rates on yellow pine from Mississippi territory to points on and north of the Ohio River must be made in strong competition with other carriers and with other woods. In other words, there is competition of product against product, and competition of carrier against carrier.

In the language of this Court, such competition not only tends to a reduction of rates, but sometimes, as the history of the country has shown, to a reduction of rates *below that which affords any remuneration to those who own property.*

169 U. S., p. 452, Smyth et al. v. Ames et al.

In the joint and several answer filed by the Illinois Central Railroad and others to the petition before the Commission, it was admitted that the previously existing rate on lumber yielded a profit to the carrier; but it was denied that either under the previous or present rates lumber is a very profitable freight, or that it is the most profitable of any freight originating in Southern territory, value, tonnage and cost of handling considered.

XXVII.

Neither the Commission Nor the Court Had Jurisdiction to Determine the Reasonableness of the Proportions of a Through Rate.

The majority report and opinion (Trans., Vol. II, p. 964) finds that "the roads north of the Ohio charge their full local rates from the Ohio River to the lumber markets in Central Freight Association territory as their proportions of the through rates."

On the same page the Commission also says:

"There are divisions of the rates south of the Ohio between what are termed the 'originating roads' on which the lumber is principally manufactured and the roads intermediate between those originating roads and the Ohio River."

Said report and opinion (Trans., Vol. II, p. 995) says:

"If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this cannot be remedied by an advance in the total through rates charged the public."

We submit that it was error of law for the Commission, and the Court, to assume jurisdiction to determine either that the proportions of the originating roads are unreasonably large, or that the proportions of the intermediate roads are unreasonably low.

In its Eleventh Annual Report the Commission said:

"We might order a reduction of the whole rate, but we could not determine how that reduction should be shared by the different carriers. If the carriers refuse to agree about that, it is difficult to see how the order could be enforced. Clearly, to make and enforce such an order we must have power to determine the divisions of this through rate between the different roads making up the joint line."

11 Ann. Rep., I. C. C., 1897, p. 27.

In the case at bar, the majority of the Commission has treated the increase of 2 cents as an increase in the total rate from shipping points in Mississippi to the Ohio River crossings, and has, in effect, ordered a reduction of 2 cents per hundred pounds in said through rate; and yet it has not attempted in this case to direct how that reduction of 2 cents per hundred pounds shall be borne between the "intermediate" roads and the "originating" roads.

If the "originating" roads be asked to bear said reduction out of their proportions, which the majority of the Commission intimates are unreasonably large, they can withdraw from the through rates to the Ohio River and send their lumber to the coast, and thence by rail or water to the Northeastern markets.

If the intermediate roads refuse to bear said reduction of 2 cents per hundred pounds out of their proportions of the through rates, which the majority of the Commission intimates are already unreasonably low, and refuse to continue to transport the traffic from Jackson or Meridian to the Ohio River, except at their local rates, the Commission

concedes, in the extract above quoted from its Eleventh Annual Report, that it had no power to coerce either the "originating" roads or the "intermediate" roads to carry the traffic at the reduced rates ordered by the majority report and opinion in this case.

It was not until the act was amended, June 29, 1906, that the Commission was given the power by the 15th section to prescribe "the just and reasonable *proportions* of such joint rate to be received by each carrier party thereto.

34 U. S. Stat. at Large, p. 584.

XVIII.

The Proportions of the Originating Roads Are Not Voluntarily Allowed to Them by the Intermediate Roads.

The majority report and opinion (Trans., Vol. II, p. 995) said:

"The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large *allowances* out of the rates made to the originating roads."

Said report and opinion (Trans., Vol. II, p. 965) said:

"The divisions allowed the originating roads are large in proportion to the length of the hauls made by them, and in proportion to the balances of the rates left for the intermediate roads. For example, the average distance from

lumber manufacturing points on the Gulf & Ship Island Road to Jackson is 80 miles. At 7 cents a hundred pounds for a haul of this length, the rate per ton per mile is 1.75 cents, or 17½ mills."

The language above quoted from said report and opinion was evidently intended to convey the impression that the allowances made to the originating lines out of the through rates were voluntarily made by the intermediate lines extending between Jackson and Meridian on the south and the Ohio River on the north.

The testimony, however, of Mr. Bowes with respect to the allowance made by the I. C. R. R. to the Gulf & Ship Island Railroad shows very clearly the conditions under which the allowance of 7 cents per hundred pounds was made to that company on lumber delivered by it to the I. C. R. R. at Jackson, viz.:

"They (i. e., the Gulf & Ship Island Railroad) had a connection at Hattiesburg with the Northeastern, and at Gulfport with the Louisville & Nashville, besides having an outlet at the gulf for export business. Their export business amounts to a great deal. I have no figures to show what they get on export traffic, but it approximates a good figure, I understand; and therefore we had three chances of not handling the traffic. The whole question is simply this: We made the best trade we could. We negotiated with the Gulf & Ship Island, and we did not give them 7 cents because we wanted to, or liked to, but we felt, after a great deal of negotiation, and after trying to get them to accept less, that our interests would be best served by granting their demands."

Trans., Vol. II, p. 488.

Mr. Thomas P. Hale, in his testimony in the Circuit Court, after detailing the conditions surrounding the Gulf & Ship Island Railroad, as a road almost entirely dependent upon its lumber traffic, and therefore under the necessity of getting a greater per ton per mile rate than intermediate lines such as the Illinois Central and the M. & O. R. R., said:

"Now, looking at the other side of the question as to why the trunk lines were justified in accepting our business and getting a much less rate per ton per mile than on their own; we went into a new territory and brought them new business, opened an entirely new territory for them altogether. We had three, or perhaps five, different lines of railroads to give our tonnage to: On the north the Illinois Central, also the Alabama & Vicksburg, part of the Queen & Crescent, at Jackson. At Hattiesburg we had the Northeastern, and through the Northeastern we had the Alabama Great Southern Railroad and the Southern Railroad, which are practically one system, I believe, and also the Mobile & Ohio at Meridian. . . . On the south, at Gulfport, we had the Louisville & Nashville Railroad. In addition to all that, we had the water down there. Therefore our connections saw that we had a position of advantage, and if they wanted to get that business they would have to make it of material advantage to us, so that it would be money in our pockets to give it to them rather than to use either of these other connections or the water. And, again, they were justified because they had their roads built, generally with rock ballast, solid roads, in many cases part of them double-tracked or about to be double-tracked; they had their organization completed, all their engineering, their roadway, their traffic and legal departments, all their various departments were organized, and those ex-

penses were going on continuously, whether they got our business or whether they did not."

Hale, Trans., Vol. I, p. 212.

To the same effect is the testimony of Mr. Haiden Miller as to the reasons justifying the Mobile & Ohio Railroad in allowing the Gulf & Ship Island and N. O. & N. E. R. R. comparatively large proportions as originating lines.

Miller, Trans., Vol. I, p. 154.

Said report and opinion does not pretend that said intermediate roads, or even the Commission itself, could compel said originating lines to accept any less proportion out of the through rates than they now demand and receive.

XXIX.

The Articles of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association Do Not Violate the Anti-Trust Act.

Said articles were adopted after this Court had decided the cases of U. S. v. Trans-Missouri Freight Association (166 U. S., p. 290), and U. S. v. Joint Traffic Association (171 U. S., p. 505).

Said articles were drawn for the purpose of eliminating those features of freight association agreements which this Court had held to be unlawful in the agreements of the Trans-Missouri Association and the Joint Traffic Association.

Those features which this Court had decided to be unlawful in the association agreements involved in those cases were omitted from the articles of the Southeastern Freight Association and the Southeastern Mississippi Valley Association; and they were omitted for the very reason that this Court had decided them to be unlawful.

This Court did not decide, in either of said cases, that *all* freight association agreements are unlawful.

On the contrary, the legality of each agreement must be determined by its own meaning and effect. To use the exact language of this Court, "the question is one of law in regard to the meaning and effect of the agreement *itself*, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act?"

166 U. S., p. 341, U. S. v. Freight Association.

This Court held that the Trans-Missouri Freight Association agreement did restrain trade or commerce so as to be a violation of the act; because, in the language of the Court, "the agreement on its face recites that it is entered into for the 'purpose of mutual protection by *establishing and maintaining* reasonable rates, rules and regulations, on all freight traffic, both through and local.' To that end the association is formed and *a body created which is to adopt rates*, which, when *agreed to, are to be the governing rates for all the companies*, and a violation of which *subjects the defaulting company to the payment of a penalty*, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet, while in force, and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary

effect is to put a restraint upon trade or commerce as described in the act."

166 U. S., p. 341, U. S. v. Freight Association.

The articles of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association will be found on pages 333 to 343, Vol. I of the Transcript; and by reference to them it will be seen that said associations were *not* formed for the purpose of *"establishing"* or *"adopting"* rates. On the contrary, said articles expressly provide that nothing therein contained shall be so construed as to confer upon a majority or any number of members, or upon any committee, or any officer of said association, the power or authority to make rates or tariffs upon the line of any other member; it being distinctly understood that each member reserves to itself the exclusive power to make rates and tariffs on its own line.

It will also be seen that said associations were not formed for the purpose of *"maintaining"* rates. On the contrary, each member distinctly reserves to itself, at all times, the right to take separate and independent action on each and every subject; and therefore it may change its rates at any time, without being subject to penalty, or even to censure.

This Court held that the Joint Traffic Association agreement restrained trade or commerce so as to be a violation of the act, because the expressed purpose of the agreement in that case was, in the language of the Court, "to *establish* and *maintain* reasonable and just rates, fares, rules and regulations on state and interstate traffic."

171 U. S., p. 562, U. S. v. Joint Traffic Assn.

"*The companies are bound to charge the rates fixed upon originally* in the agreement, or subsequently recommended by the Board of Managers, and *the failure to observe their recommendations is deemed a violation of the agreement.*"

171 U. S., p. 563, U. S. v. Joint Traffic Assn.

"By this agreement *the Board of Managers* is, in substance, and as a result thereof, *placed in control of the business and rates of transportation*, and its duty is to see to it that *each company charges the rates agreed upon*, and *receives its equitable proportion of the traffic.*"

171 U. S., p. 565, U. S. v. Joint Traffic Assn.

By reference to the articles of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association (Trans., Vol. I, pp. 333-343) it will be seen that said associations have absolutely no power to either "*establish*" or "*maintain*" rates; because it is expressly provided that no majority, nor any number of members, nor any committee, nor any officer of said association, shall have the power to make rates upon the line of any other member; and said member reserves to itself the exclusive power to make its own rates.

It will also be seen that the members of said associations do not agree to charge any designated rates, for any period whatever; because each member reserves to itself the exclusive right to make its own rates and to change them at will; subject only to the notice required by law.

It will also be seen that in said associations there is no board of managers or other board, committee, or officer, placed in control of the business or rates of any member,

or authorized to see to it that each member charges any designated rates. On the contrary, each member has exclusive control of its own business and rates, and may change them whenever it sees proper to do so.

It will also be seen that in said associations there is no board of managers, committee or officer authorized to see that each company "receives its equitable proportion of traffic," or to see that there is any pooling whatever, either of traffic or earnings.

Said associations understand perfectly that since the decisions of this Court in the Trans-Missouri and Joint Traffic cases, no freight association can be lawfully vested with power to make or maintain rates, or to pool freights or earnings.

Said associations have, therefore, confined their objects and purposes to furnishing a place and method whereby any member desiring to obtain the views of other members in regard to any rate or regulation, may have the subject discussed and considered; it being well understood that such discussion and consideration are merely advisory, and that each member reserves the right to form its own opinion and determine its own action upon every matter connected with its own road, and to change its action at any moment; whether such matter has or has not been submitted to the association for discussion.

XXX.

There Was No Agreement Between Competing Lines to Make the So-Called Advance of Two Cents Per Hundred Pounds on Lumber.

In its majority report and opinion (Trans., Vol. II, p. 963) it is said:

"It was understood to be impracticable for the lines east of the Mississippi to advance their rates without a corresponding advance by the lines west of the Mississippi, and consequently there was a concurrence or *agreement* between them before the advance was made."

Trans., Vol. II, p. 963.

The testimony is positive that there never was any agreement to advance the rates on lumber, and that the advance was the result of the separate and independent action of each carrier.

Compton, Trans., Vol. II, pp. 281, 282.
Steele, Trans., Vol. II, pp. 419, 415.
Green, Trans., Vol. II, p. 209.
Bowes, Trans., Vol. I, p. 133.

XXXI.

There Was No Concert of Action or Previous Understanding Between Competing Lines in Regard to Said So-Called Advance.

The majority report and opinion (Trans., Vol. II, p. 992) said:

"The proof shows conclusively that the advance was the outcome of concert of action and a previous *understanding* between the companies."

There was no testimony to support that finding, except the fact that defendants respectively published their individual and separate tariffs, announcing that said increase would be made at or about the same time.

The words "concert of action" and "previous understanding" were evidently used to import an "agreement," "contract," "combination" or "conspiracy;" and, taken in that sense, we repeat that there was no evidence to support the finding.

XXXII.

Even if There Had Been "Concert of Action" or "Previous Understanding," It Would Not Have Rendered Appellants' Action Unlawful.

The testimony shows that there was no concert of action, and no previous understanding between appellants in the sense of an agreement.

There was consideration and interchange of views between the representatives of appellants and other competing carriers, which resulted in each of appellants becoming convinced that the proposed increase in rates was just and proper. Each of appellants believed, from what its representative had heard during the discussions and interchanges of views which had occurred between them, that the other appellants and companies would put said increase into effect on a certain date; but there was no understanding, in the sense of an agreement, that any one of appellants would put said increase into effect.

But if there had been an "understanding" or "concert of action," even in the sense of an agreement, it would not have rendered appellants' action illegal; because the increase would have been put into effect by each of appellants separately and independently, and with the express reservation to each of appellants of the right to revoke the advance at any moment. Such concert, or understanding, even if it had been in the sense of an agreement, would have been totally different from the concert or understanding which existed between the members of the Trans-Missouri Association and of the Joint Traffic Association; because each of those associations was formed by a contract, under *which the companies selected a central authority to fix and maintain rates, and no company could change the rates* fixed by the representative managers of said association, without subjecting itself to a penalty.

See Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

XXXIII.

It is Not Unlawful for Competing Carriers to Confer Together on Matters of Common Interest.

In its majority report and opinion, the Commission said:

"Through their authorized official representatives, they (the railway companies) conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber-producing districts, the advance should be from all those districts or none; and finally they all promulgated the advance to take effect at exactly the same time and for exactly the same amount."

Trans., Vol. II, p. 992.

The finding that through their authorized official representatives the railways conferred with each other repeatedly as to the making of the increase is true. But appellants insist that there is, neither at common law nor under the statutes of the United States, anything illegal in the representatives of competing carriers conferring with each other, however often, as to making an increase or reduction in rates.

The finding that the railways recognized the fact that because of competition in common markets, between the lumber-producing districts served by them (i. e., the Arkansas district; the Louisiana, Mississippi and Alabama district; and the Georgia district), the increase, if made, should be made at or about the same time from all of those competing districts, on lumber, is true.

It was necessary for each of the lines operating in either of said districts to ascertain whether every other line in that district would increase the rates; and equally necessary to ascertain whether each of the lines operating in the other competing districts would also increase its rates. That fact could not be ascertained except by correspondence or conference; and there is nothing in the law which prohibits such correspondence or conference.

On December 28, 1899, the Interstate Commerce Commission submitted to the Attorney General of the United States certain proposed advances in the official classification, and requested his opinion as to whether the evidence taken by the Commission, and reported to the Attorney General, showed a violation of the act of Congress commonly known as the Sherman Anti-Trust Law. The Attorney General, among other things, said:

"There is an Official Classification Committee, composed of some fourteen railroad officers from different sections. This committee meets on the call of its chairman or upon the request of three members. At its meetings, *suggested changes are considered.* Such changes as the committee with substantial unanimity recommend are noted by the chairman and incorporated into a new official classification, which is then submitted to each company *for its individual action.* Some sixty railroad companies thus *independently pass upon the classification.* They signify their adoption to the chairman, who, after the official classification has been thus adopted, files it with the Interstate Commerce Commission in compliance with the law."

13 Ann. Rep., I. C. C., p. 17.

The second section of Article II of the Southeastern

Freight Association provides that any member of said association "proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration and interchange of views, before said change shall take effect; but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not."

Article VII of said association provides that "nothing herein contained shall be so construed as to confer upon a majority, or any number of members of this association, the power or authority to make rates or tariffs upon the line of any other member of this association, or to make joint rates or tariffs for any other member." . . .

"It being distinctly understood that each member of this association expressly reserves to itself the exclusive power to make rates and tariffs on its own line, and to itself and its connections the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members."

Trans., Vol. I, p. 336.

Provisions in substance the same occur in the articles of the Southeastern Mississippi Valley Association.

Trans., Vol. I, pp. 342, 343.

Any member of said associations may suggest any change in rates that it sees proper to suggest. The change is then considered by the different members of the association, and at that point the function of the association absolutely ends. There is no vote taken by the members of

the association; and every member is left at perfect liberty to adopt or reject the proposed change, as it may deem best. If the proposed change be adopted, by every member of the association except one, that one is at perfect liberty to decline to follow the suggestion.

The Attorney General, in the case above referred to, further said:

"To authorize the Attorney General to direct an injunction proceeding under this law, it must be shown that there is a 'contract, combination, . . . or conspiracy in restraint of trade or commerce among the several States.' In the first place, *there is no contract, combination or conspiracy shown. There is consultation by representative railroad men in committee respecting suggested changes in classification. There is subsequent independent action by railroad companies in the adoption of the new classification recommended by the committee. The testimony taken does not show that any railroad company acted under compulsion of a combination* in adopting the official classification. It must be conceded that a common classification by railroad companies operating in the same territory is a desirable thing. *Will it be insisted that a railroad company cannot consult respecting freight classification? Or that, because one railroad company adopts a certain classification, another cannot? The Anti-Trust Law says there must be a contract, combination or conspiracy.* This must be shown. *And it must be shown to restrain individual action.* This is not shown in the testimony submitted."

13 Ann. Rep., I. C. C., p. 18.

There is consultation by representative railroad men in the meetings of said associations respecting suggested

changes in rates or regulations, but after those consultations have been had, the subsequent action by each railroad company as to whether it will adopt the suggested change in rates or regulations is absolutely separate and independent. The testimony taken in this case not only does not show that any railroad company acts under compulsion of a contract, combination, or conspiracy, in adopting the course of action which its representative deems wise; but it shows affirmatively that the articles of said associations expressly prohibit any member, or committee, or officer thereof from making rates upon the line of any other member of the association; and expressly reserve to each member the exclusive power to make rates and tariffs on its own line, and to itself and its connections the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members.

The Attorney General, in the case above referred to, further said:

"If a railroad company maintains the existing rates, the change of an article from a lower to a higher class will increase the rate, but, from aught that appears in this testimony, *every railroad company using the classification is at liberty at any time to change the existing rates upon giving the notice required by the Interstate Commerce Act.* Moreover, each railroad company is free to take any article out of the existing classification by making a commodity rate. In other words, *no suppression of competition, no arbitrary fixing of rates, no restraint of interstate commerce is shown.*"

13 Ann. Rep., I. C. C., p. 18.

Section 2 of Article II of the Southeastern Freight Association is as follows:

"Any member of this association proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration and interchange of views, before such change shall take effect; but it is distinctly understood that each member reserves to itself at all times the right *to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not.*"

Article VII of said association expressly provides "that each member of this association expressly reserves to itself *the exclusive power to make rates and tariffs on its own line*, and to itself and its connections the exclusive power to make joint rates and tariffs, *free from the dictation or control of any other member or members.*"

To the same effect is Article III of the articles of the Southeastern Mississippi Valley Association.

Trans., Vol. I, pp. 342, 343.

Every member of either of said associations is, in the language of the Attorney General, "at liberty at any time to change the existing rates upon giving the notice required by the Interstate Commerce Act." . . . "In other words, no suppression of competition, no arbitrary fixing of rates, no restraint of interstate commerce is shown."

The Attorney General, in the case above referred to, further said:

"The Trans-Missouri and Joint Traffic Association cases afford no precedent for the action requested in this case. Each of those associations was formed by a *contract under which the companies selected a central authority to fix and maintain rates.* There was an absolute suppression of com-

petition. The power of independent action was destroyed. No company could change a rate fixed by the managers of the association without subjecting itself to a penalty."

13 Ann. Rep., I. C. C., p. 19.

In the articles of the Southeastern Freight Association and in the articles of the Southeastern Mississippi Valley Association the companies did *not* select a central authority, or any other authority, *to fix and maintain rates.* On the contrary, the articles of each of said associations expressly provide that nothing therein contained shall be so construed as to confer upon a majority, or any number of members of such association, the power or authority to make rates or tariffs upon the line of any other member of such association, or to make joint rates or tariffs for any other member; that nothing therein contained shall be so construed as to confer upon the Executive Board, or the Conference Committee, or the chairman of the association, or the chairman of the Executive Board, or upon any other committee or officer of such association, the power or authority to make rates or tariffs upon the line of any member of such association, or to make joint rates or tariffs for any member of such association.

In the articles of said associations there is absolutely no suppression of competition. On the contrary, the articles of each of said associations expressly reserve to each member of the association the power of independent action, and the power to change any rate without subjecting itself to a penalty, or even to the censure of other members of the association, or of any one else.

In the Trans-Missouri and Joint Traffic Association

cases, all that was held by this Court was *that no power to make and maintain rates could be conferred upon traffic associations;* and therefore the articles of each of said associations expressly declared that no majority or any other number of members of said association, nor any board, committee or officer of such association should have the power or authority to make or maintain rates or tariffs upon the line of any member of such association.

It was decided by this Court, in the Trans-Missouri and Joint Traffic Association cases, that as those associations were formed by a contract under which the companies selected a central authority to fix and maintain rates, there was an absolute suppression of competition; and that the power of independent action was destroyed, inasmuch as no company could change a rate fixed by the managers of the association without subjecting itself to a penalty; it was, therefore, expressly provided in the articles of the Southeastern Freight Association and the Southeastern Mississippi Valley Association that no officer, board or committee, or the chairman of any board or committee, or any number of members of the association (not even a majority) should have the power or authority to make rates or tariffs upon the line of any member of the association. In order to prevent the "power of independent action" from being destroyed, it was distinctly specified that each member of the association "expressly reserves to itself the exclusive power to make rates and tariffs on its own line, and to itself and its connections the exclusive power to make joint rates and tariffs, free from the dictation or control of any other member or members."

XXXIV.

No Contract Violates the Anti-Trust Act Unless Its Direct and Immediate Effect is a Restraint Upon Interstate Commerce.

This Court did not decide, in the Trans-Missouri and Joint Traffic Association cases, that the Anti-Trust Act forbids *all* agreements that may be made, even between competing carriers. This Court only decided that agreements which give to traffic associations, or to their members or officers, *power to make and maintain rates* are unlawful; and the only reason why the Court decided that those agreements are unlawful, is because their *direct, immediate and necessary effect* is to put a restraint upon trade or commerce as described in the act.

166 U. S., pp. 341, 342, U. S. v. Frt. Assn.

In the case of U. S. v. Joint Traffic Association, this Court said:

"In Hopkins v. United States, decided at this term, *post* 578, we say that *the statute applies only to those contracts whose direct and immediate effect* is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce *must not be indirect or incidental only.* An agreement entered into for the purpose of promoting the legitimate business of an individual or a corporation, with no purpose to thereby affect or restrain interstate com-

merce, and which does not *directly* restrain such commerce, is not, as we think, covered by the act, *although the agreement may indirectly and remotely affect that commerce.* We also repeat what is said in the case above cited, that '*the act of Congress must have a reasonable construction,* or else there would scarcely be an agreement or contract among business men that could not be said to have, *indirectly or remotely,* some bearing upon interstate commerce and possibly to restrain it.' "

171 U. S., p. 568, U. S. v. Joint Traffic Assn.
171 U. S., p. 578, Hopkins v. U. S.

Under the decisions of this Court in the Trans-Missouri and Joint Traffic Association cases, railroads, like other corporations and private individuals, may make any agreement with reference to traffic in which they have a common interest, provided its *direct, immediate* and *necessary* effect is not a restraint upon interstate commerce; and it is not sufficient to invalidate traffic agreements to show that they have "*indirectly* or *remotely* some bearing upon interstate commerce, and possibly to restrain it."

171 U. S., p. 568, U. S. v. Joint Traffic Assn.

To illustrate: Article II, Section 1, of the Articles of Association of the Southeastern Freight Association, prescribes how the Conference Committee shall be constituted. And Section 2 of said article provides that: "Any member of this association proposing to make any change in its rates, rules or regulations, will suggest the same to said Conference Committee for consideration, and interchange of views, before such change shall take effect; but it is distinctly understood that each member reserves to itself at all times the right to take separate and independent action on

each and every subject, whether suggested to said Conference Committee or not."

Trans., Vol. I, p. 334.

Article II, Section 1, of the articles of the Southeastern Mississippi Valley Association contains a similar provision.

Trans., Vol. I, p. 342.

It may be conceded that the section just quoted *"indirectly," "incidentally,"* or *"remotely"* affects interstate commerce, in the sense that the "consideration" and "interchange of views" provided for may result in a change of rates, that otherwise would not occur. *But it does not have a "direct and immediate effect"* upon interstate commerce; because, as a matter of fact, no change of rates may result from such consideration and interchange of views; and, if it should, each member reserves to itself at all times the right to take separate and independent action on each and every subject, whether suggested to said Conference Committee or not. Therefore if any change in rates should be made, as the result of said consideration and interchange of views, such change may immediately thereafter be revoked by any member, and by its separate and independent action. It is in that very respect that the Southeastern Freight Association and the Southeastern Mississippi Valley Association differ from the Trans-Missouri and Joint Traffic Associations. As said by the Attorney General, those (the Trans-Missouri and Joint Traffic) associations were formed by contracts under which the companies *selected a central authority to fix and maintain rates. No company could change a rate fixed by the managers of the association* without subjecting itself to a penalty; and therefore there was an absolute suppression of competition; and the power of independent action was destroyed.

13 Ann. Rep., I. C. C., p. 19.

But in the Southeastern Freight Association and in the Southeastern Mississippi Valley Association *no power was conferred upon any board, committee, officer or member of the association to make rates upon the line of any* other member; and each and *every member was expressly authorized to change its own rate,* at any time, free from the dictation of any other line.

This Court decided that the Trans-Missouri and Joint Traffic Associations were unlawful, because their *direct, immediate* and *necessary* effect was to put a restraint upon interstate traffic; and that their direct, immediate and necessary effect was to put a restraint upon interstate commerce, *because they conferred upon their officers power to make and maintain rates, and reserved no right to their individual members to change such rates.*

166 U. S., 341, 342, U. S. v. Frt. Assn.

XXXV.

Appellants Did Not Promulgate the Increase of Rates on the Same Day.

The majority report and opinion in this case (Trans., Vol. II, p. 992) said:

"They (appellants) all promulgated the advance to take effect at exactly the same time and for exactly the same amount."

The testimony shows that each of the appellants (except the L. & N. R. R.) did promulgate that the increase should take effect at exactly the same date; but it also shows

that appellants did not make their promulgation of the increase on the same date.

The testimony shows that the written declarations filed by the several appellants in this case with Chairman Washburn, notifying him of the increase in rates complained of in this case, were not filed jointly, but were filed separately and independently by each of the appellants; and that they were filed on different dates.

The written statement or declaration of the L. & N. R. R. Co., promulgating the increase of 2 cents per hundred pounds, was dated March 13, 1903.

Trans., Vol. II, p. 772.

The written statement or declaration of the M. & O. R. R. was dated March 18, 1903.

Trans., Vol. II, p. 778.

The written statement or declaration of the Southern Railway Company was dated March 21, 1903.

Trans., Vol. II, p. 780.

The written statement or declaration of the I. C. R. R. Co. was dated March 9 and 16, 1903.

Trans., Vol. II, pp. 766, 775.

The fact that the increases severally promulgated by appellants were to take effect at exactly the same date is immaterial; because there is nothing in the law to prohibit one railroad company from making its tariff take effect upon the same date that the tariffs of its competitors are to take effect.

It is to the interest of the public, as well as of competing carriers, that the tariffs of all competing lines shall take effect on the same date. The sixth section of the original Act to Regulate Commerce (which was confessedly an experimental act) required that every common carrier, subject to its provisions, should file with the Commission copies of its schedule of rates, and should promptly notify the Commission of all changes made in the same.

24 U. S. Stat. at Large, pp. 379, 380.

As to the finding that appellants promulgated the increase to take effect "for exactly the same amount," it was useless for either of appellants to promulgate its increase for more than the increase promulgated by its competitors; and as each of appellants was satisfied, from their discussions and interchanges of views, that each of them would make the increase for the same amount, it was accordingly done.

XXXVI.

There Has Been No Suppression of Competition in This Case.

The majority report and opinion (Trans., Vol. II, p. 993), said:

"Competition is favored by the laws. . . . The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates."

In support of that proposition, the majority of the Commission refer to the decisions of this Court in the Trans-Missouri and Joint Traffic Association cases.

The facts in those cases fell clearly within said proposition; the soundness of which is fully conceded.

But "the Trans-Missouri and Joint Traffic Association cases" afford no precedent for the application of said proposition to the facts of this case.

"Each of those associations was formed by a contract under which the companies selected a central authority to fix and maintain rates. There was an absolute suppression of competition. The power of independent action was destroyed. No company could change a rate fixed by the managers of the association, without subjecting itself to a penalty."

Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

In this case the members of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association have not selected a central authority, or any other authority, to fix and maintain rates. On the contrary, each member expressly reserves the right to make and change its own rates. There cannot be "a suppression of competition," nor a destruction of "the power of independent action," under articles of association which expressly reserve to each member the right to change its rates at any moment. There has never been an instant of time since the increase in rates complained of in this case was promulgated when any member of either the Southeastern Freight Association, or of the Southeastern Mississippi Valley Association, could not revoke said increase and reduce its rates to any figure; even though such figure be below that at which the rates were, when said increase was made.

XXXVII.

The Increase of Two Cents Per Hundred Pounds is the Outcome of Competition.

The majority report and opinion (Trans., Vol. II, p. 994), said:

"The advanced rates complained of cannot be claimed to be the outcome of competition, because 'the natural, direct and immediate effect of competition is to lower' (171 U. S., 577, 43 L. Ed., 290, 19 Sup. Ct. Rep. 25), rather than advance, rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce."

Appellants certainly do claim that the increased rates complained of are the outcome of unrestrained competition; and they do so, because said rates are the outcome of the action of carriers who can, and do, compete, free from any restraint whatever. The circumstances and conditions existing when said increase of 2 cents per one hundred pounds was made would have fully justified a much greater increase, and it was nothing but the competition which existed between the appellants that prevented an increase of much more than 2 cents.

Appellants have hereinbefore shown that the Articles of Association of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association do *not* "suppress competition" nor "destroy the power of individual action."

Competition always exists, and exists in every case, so long as each and every competitor reserves to itself the right to make or change its own rates.

See Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., pp. 18, 19.

XXXVIII.

Neither the Commission Nor the Circuit Court Had Any Jurisdiction, in This Case, of the Anti-Trust Act.

The majority report and opinion (Trans., Vol. II, p. 994), said:

"We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to an unlawful agreement under the so-called 'Anti-Trust Act'—the enforcement of that act being a matter properly cognizable by the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition, and during the time the rates fixed by concert of action are maintained the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates."

We have hereinbefore shown that there was no concert of action in the sense of an agreement or understanding; and that if there had been concert of action, even in the sense of an agreement, it would not have violated the Anti-Trust Act: because there was no suppression of competition nor destruction of the power of independent action.

See Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

As to the proposition asserted in the extract quoted above, that concert of action is wholly inconsistent with competition, we have hereinbefore shown that, though it be true that concert of action which amounts to an absolute suppression of competition, and the destruction of independent action, as was the fact in the Trans-Missouri and Joint Traffic Association cases, is prohibited, yet where the association has no power to make and maintain rates, and each individual member reserves the right to make and change its own rates, free from the dictation of any one, such concert of action does not "suppress competition" nor "destroy independent action," and therefore is not prohibited by the Anti-Trust Act.

Opinion of Hon. John W. Griggs, Attorney General, 13 Ann. Rep., I. C. C., p. 19.

As to the proposition asserted in the extract quoted at the head of this section that "during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates." The majority of the Commission doubtless relies upon, though it does not cite, the following language from the opinion of this Court in the case of U. S. v. Trans-Missouri

Freight Association, 166 U. S., 341, viz.: "And although the parties have a right to withdraw from the agreement *on giving thirty days' notice of a desire so to do, yet while in force (i. e., the contract of association), and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.*"

The difference between the Trans-Missouri case, and this case, is that in the former, the companies selected a central authority to fix and maintain rates, which was an absolute suppression of competition and a destruction of the power of independent action. So long as a company remained a member of the Trans-Missouri Association, whether it did so for an hour, a day, a week or a month, its rates were absolutely controlled by the central rate-making authority of the association, and it could not change any rate fixed by that authority without subjecting itself to a penalty; but in the case of the Southeastern Freight Association and of the Southeastern Mississippi Valley Association, no rate is fixed by the association, or by any central authority within the association, because each and every rate is made separately and independently by the individual members; and instead of agreeing that rates made by the association, or any central authority in the association, shall be maintained by a member until it gives thirty days' notice of a desire to withdraw from the association, the articles of said associations expressly provide that each and every member may change its rates at any time without withdrawing from the association, and without hindrance from any one, either in or out of the association. There never has been an hour or even a minute during which any member of said associations has been bound to maintain any rate made by it for any length of time, however brief.

As to the proposition involved in the extract quoted above, that though the enforcement of the Anti-Trust Act is not properly cognizable by the Commission, it is within the scope of the authority and duty of the Commission to consider the action of the appellants as members of the Southeastern Freight Association, and of the Southeastern Mississippi Valley Association, in the aspect of its bearing upon the reasonableness and validity of the increased rates, we insist that if the Commission has no jurisdiction to enforce the Anti-Trust Act, it has no right to consider whether the action of the appellants as members of either of said associations is, or is not, in violation of that act; and while the majority of the Commission "deem it unnecessary to express an opinion" as to whether the appellants have violated said act, the enforcement of which is admitted to be "properly cognizable by the courts," the report and opinion of the majority is predicated almost entirely upon the proposition that the appellants have violated said act in increasing the rates in controversy in this case.

In the case of Sprigg v. B. & O. R. Co., 8 I. C. Rep., pp. 456, 457, the Commission took what, we contend, is the sound view of this question. In that case the Commission said:

"The real difficulty is that the Commission has no authority to administer the Anti-Trust Law, *or even to determine whether that law has been violated.* A court of general jurisdiction could do so, but not an administrative body whose power is limited by the law which created it. We are not prepared to admit that the evidence in this case shows a violation of the statute against trusts, but, even if the fact of such violation were clearly established, *we do not*

see how that of itself furnishes ground for an order by us against the rates now in force. Whatever may have been the nature of the agreement or understanding, if there was any, which preceded or resulted in the withdrawal of the quarterly ticket by both roads at about the same time, there is no proof whatever that the rates now charged are maintained by virtue of unlawful compact. If each carrier had advanced its rates by purely independent action and in a perfectly legal manner, and such advanced rates were reasonable in fact under all the circumstances, no doubt could arise as to the lawfulness of the transaction. *Would those same rates be rendered unreasonable by showing that lower rates were withdrawn by a concert of action prohibited by the Anti-Trust Law?* We do not think so. If an investigation by the Commission discloses a violation of that law, *its power is not enlarged or its duty changed in respect of the rate involved in the inquiry.* The most it could do in such case would be to lay the proofs before the Attorney General for such action as he might think proper to take."

In the case of Cattle Raisers' Assn. v. Ft. W. & D. C. Ry. Co. et al., 7 I. C. Rep., 535, the Commission held, in substance, the same that it held in the Sprigg case above cited.

If the Commission had no jurisdiction to declare said increase of 2 cents per one hundred pounds to be unreasonable because it violates the Anti-Trust Act, the majority of the Commission, in their report and opinion, should not have referred in any way to that act.

But the frequent references in the majority opinion to said act, and to the Trans-Missouri and Joint Traffic Association cases, make it manifest that if the majority of the

Commission had not believed that the action of the appellants as members of said associations is violative of said act, said majority report and opinion would not have found that said increase is unreasonable or unjust.

To paraphrase the language of this Court in the case of I. C. C. v. L. & N. R. R. Co., 190 U. S., pp. 284, 285, no room in reason is left to sustain the view that the majority of the Commission could have held that said increase of 2 cents per hundred pounds was in and of itself unreasonable, if appellants had not been members of said associations.

XXXIX.

The Error of Judge Speer in Holding That the Purpose of the Southeastern Freight Association is "To Fix and Control Rates."

The appellee will doubtless rely upon the decision of District Judge Speer in the case of Tift et al. v. Southern Ry. et al., a somewhat kindred case, which has been appealed to this Court, and is to be heard immediately after this case.

In the Tift case Judge Speer said that the purpose of the Southeastern Freight Association is "plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight."

138 Fed Rep., p. 754, Tift v. Southern Ry.

The "purpose" of said association must, of necessity, be ascertained either from its articles of association or from the action of its members.

Said articles certainly disclose no such "purpose" as is

attributed by His Honor. On the contrary, they expressly provide that neither a majority, nor any number of members of the association, nor any board, committee or officer of the association, shall have any power or authority to make or fix rates or tariffs upon the line of any member of the association.

Trans., Vol. I, p. 240.

We deny that His Honor had any right to ascribe to said association an illegal "purpose" merely because he evolved it "out of his inner consciousness."

XL.

Neither the Southeastern Freight Association Nor the Southeastern Mississippi Valley Association Has Any Authority to Issue a "Firman" or "Ukase."

His Honor, Judge Speer, said: "The territory to which this association (i. e., the Southeastern Freight Association) extends its dominating control comprehends the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the Sultan or the ukase of the Czar."

138 Fed. Rep., pp. 754, 755, Tift v. Southern Ry.

A French officer, while witnessing the celebrated "charge of the six hundred," exclaimed: "It is magnificent, but it is not war!" and so we say of the inflammatory and sophomorical language employed by His Honor, "It is magnificent, but it is not true."

As shown by the articles of said association, neither of them has one iota of control over the rates charged for transportation in the "imperial territory" described by His Honor, or in any other territory. And so far from said associations having the power to issue orders "more authoritative than the firman of the Sultan or the ukase of the Czar," they have absolutely no power to issue any order at all.

XLI.

Appellants Have Not Violated the Pooling Section of the Interstate Commerce Law.

His Honor, Judge Speer, said:

"This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the Interstate Commerce Law, which forbids *pooling.*"

138 Fed. Rep., p 761, Tift v. Southern Ry.

The fifth section of the Act to Regulate Commerce prohibits "the pooling of freights of different and competing railroads," or the division between them of "the aggregate or net proceeds of the earnings of such railroads, or any portion thereof."

24 U. S. Stat. at Large, p. 379 et seq.

Inasmuch as the articles of said association contain no reference whatever either to a physical pooling of freights, or to a division of earnings by means of a money pool, and inasmuch as the conferences between the railways preceding the increase complained of had absolutely nothing to do with a division of traffic, or of earnings from traffic between competing railways, it is imposssible to discover the process of reasoning upon which the erroneous assertion above quoted was arrived at by His Honor.

XLII.

We have Never Insisted that Because the Members of Said Associations Could Withdraw from the Association Agreement at Any Time, it Was Not a Combination in Restraint of Trade.

His Honor, Judge Speer, further said:

"It was insisted by the learned special counsel for respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. That is merely a recitation of a privilege which any party to an unlawful enterprise enjoys."

138 Fed. Rep., p. 763, Tift v. Southern Ry.

The counsel referrred to by His Honor never insisted that because each and all the members could at will and at any time withdraw from the association agreement, it was

not a combination in restraint of trade. What said counsel did contend for was that the association agreement was not an "agreement to fix rates" at all.

His contention was that there was not, and could not be, any "agreement to fix rates;" because the articles of association expressly provide that no majority, nor any number of members, nor any committee, nor any officer of said association, shall have the power to make rates upon the line of any other member, and expressly reserve to each member the right to make its own rates, and to change them at will.

In the Trans-Missouri Association case there did exist an illegal "agreement to fix and maintain rates," and no member could change the association rates without withdrawing from the association agreement. See 166 U. S., p. 341.

But in this case we contend that there is absolutely no agreement to either "fix' or "maintain" rates; that there are no such rates as "association rates;" that each member expressly reserves the right to make its own rates; and that it may change those rates at any time, without withdrawing from said association.

It is not the case of a party to an unlawful association agreement being compelled to withdraw from the association before it can change the "association rates;" but it is the case of a party who under the terms of a lawful association agreement has the right to make its own rates and to change them at any time, without withdrawing from the association at all.

We do not object to His Honor inventing a faulty argument, and then answering it to his own satisfaction; but we do object to his ascribing to us a faulty argument which we did not make, while he fails to answer the argument which we did make.

XLIII.

Appellants have Never Claimed the Right to Arbitrarily Increase Freight Rates.

His Honor, Judge Speer, further said:

"The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by *arbitrarily* increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations."

138 Fed. Rep., p. 763, Tift v. Southern Ry.

Neither the appellants in this case, nor those in the Tift case ever entertained any such belief as His Honor invented and ascribed to the defendants in the latter case. They know that the rates in controversy in this case have not been made *"arbitrarily;"* and their "belief" is that said rates have been fairly and equitably adjusted upon full consideration of the cost of service to the carrier, the value of the service to the shipper, the effect of competition between carrrier and carrier, the effect of competition between market and market, the effect of competition between product and product, and every other circumstance and condition which should be considered in attempting to arrive at a just and reasonable rate.

XLIV.

The Commission Erred in Finding that the Average Rate Per Ton Per Mile on Lumber Originating on the Illinois Central Railroad in 1903 Was Greater than the Average, 5.91 Mills, on All Traffic.

In its majority report and opinion, Trans., Vol. II, p. 966, the Commission said:

"Lumber is a low class traffic (class 6 under both the Southern and Official Classifications), much below the average classification, but the average rate per ton per mile on lumber originating on the Illinois Central road in 1903 was greater than the average, 5.91 mills, on all traffic."

Mr. Bowes, in his deposition given in the Circuit Court, said with reference to this finding of the Commission:

"I don't think that was ever figured out on all the shipments over the Illinois Central Railroad, at any time, and never has been figured out yet, and I am, therefore, at a loss to know from what source, or by what means, the Interstate Commerce Commission became possessed of information on that point. I have never seen it figured out."
Bowes, Trans., Vol. I, p. 171.

Mr. Bowes then gave illustrations of rates from McComb City to points in Iowa to show that the rate per ton per mile yielded by the rates was not as much as 4 mills.
Bowes, Trans., Vol. I, p. 172.

It is shown by Mr. Green's Exhibit No. 9, Trans., Vol. I, pp. 344, 345, that the 6th class rate from McComb, Miss., to Cairo, Ill., is 40 cents; and it is also shown by said exhibit that the rate on pine lumber from McComb to Cairo is 16 cents, or 24 cents less than the sixth class rate. This comparison will give some idea of the very great concession that has been made by the railways in the establishment of commodity rates upon lumber.

XLV.

Since the Testimony in this Case was Concluded Before the Commission in February, 1904, Conditions Surrounding the Lumber Traffic Have Undergone a Material Change for the Better.

Mr. Green in his deposition given in the Circuit Court on February 9, 1906, thus reviews the conditions since April 15, 1903, the date of the increase complained of:

"The advance of 2 cents a hundred pounds to points on and north of the Ohio River in rates on lumber from Mississippi, etc., took effect on April 15, 1903. Prior to that time there had been great activity in the lumber market in that section, prices were high and demand very strong, largely due to the fact that the railroads were heavy purchasers of structural timber and other lumber for their own use. The demand for lumber in the building trade was also very good and the prices high. Those conditions continued until some time during the last half of 1903, when the movement began to diminish because of the fact that the railroads had retired from the market for cars, our company,

for instance, having bought only 703 freight cars in the entire year 1903, and due to other depressing conditions; probably owing to the approaching Presidential election and some uncertainty as to the outcome of that, and stringency in the financial market, which curtailed operations generally. Those conditions continued through the first half of 1904. On June 29, 1904, the secretary of the Southern Lumber Manufacturers' Association at St. Louis sent out a circular letter addressed to members and manufacturers, stating that 'as a result of the interchange of information regarding the condition of stocks and the steady accumulations since January 1, members and manufacturers representing over 75 per cent of the output in the States of Missouri, Arkansas, Texas, Louisiana, Mississippi and Alabama have decided to reduce their running time at saw mills at least 33 1-3 per cent, beginning July 1. It is believed if those who have not yet decided to reduce running time will cooperate, the deplorable conditions now prevailing will soon be relieved.' "

"These conditions naturally resulted in a curtailment of the movement. The action on the part of the mill owners, beginning on July 1, 1904, reducing their output one-third, of course, affected the movement. Prices were also somewhat affected, and in February, 1904, a reduction of prices was made, the prices then adopted being lower than they had been for a considerable period before that, and lower certainly as to some classes of lumber than they had been since March, 1901. This low scale of prices, however, was temporary, and they began again to advance in August, 1904. I have a statement, marked Exhibit No. 1, which gives a comparison of prices on yellow pine lumber at points north of the Ohio River taking a rate of 23 cents, that pre-

vailed in January, 1904, prior to the reduction; in February, 1904, when the reduction was made; in August, 1904, when the prices began to advance, and in February, 1906—that is, the present prices. This statement shows that in January, 1904, the price of 'A Edge Grain Flooring' was $29 per thousand feet. In February it had been reduced to $26. It was the same in August. But at the present time it is $35.50, an advance of $9.50 per thousand feet since February, 1904."

"'A Flat Grain Flooring,' worth $21 in January, 1904, reduced to $19.50 in February, 1904, and advanced to $20.50 in August, 1904, and is now $29.50, an increase of $10 as compared with February, 1904. The entire list was not advanced in August, 1904, but has been advanced subsequent to that time as I will hereafter show."

"Now, as showing the reasons for the improved conditions since the short period of depression, between February and August, 1904, I previously stated that the Southern Railway ordered only 703 freight cars in the entire year of 1903. We ordered none the first half of 1904, but from June 1, 1904, to June 1, 1905, the Southern Railway ordered 10,503 new freight cars. And since June 1, 1905, to date we have placed additional orders for 11,806 new freight cars. Other railroads in the country have placed large orders for freight car equipment and practically every carworks in the country is now running full time and is behind with its orders. Therefore the existing conditions with respect to the lumber traffic to points on and north of the Ohio River are substantially different from those existing in February, 1904, in that the demand is very much greater and the prices are very much higher."

Green, Trans., Vol. I, pp. 245, 246, 247.

After the advance of April 15, 1903, railroads generally, particularly east and north, called a halt in their expenditures for improvement and for new equipment, because of some apprehension as to the disturbance of the money market and possible curtailment of business. The Presidential election had a very important bearing on the matter, and affected all financial enterprises and all building operations generally.

Green, Trans., Vol. I, pp. 247, 248.

Mr. Compton, upon being asked to state what changes if any there had been in general conditions since February, 1904, said:

"Improved market conditions and demands for lumber. Locomotive works and car manufactories cannot supply the demand upon them. Business conditions have generally improved and continue to improve, and the end is not yet in sight. In so far as the prosperity of the lumbermen is affected by the general prosperity, they have no cause of complaint and have great cause for satisfaction. The car supply of the Louisville & Nashville Railroad has been taxed to its utmost. This is true with respect to lumber shipments, as well as of commodities in general; although we are now furnishing to lumber shippers on our line more cars than we were called upon to furnish in previous years, yet the supply is inadequate, and no transportation man could possibly have anticipated and been ready for the emergency which has occurred. By reason of shortage of cars, the Louisville & Nashville Railroad has considered that its first duty was to the mill men upon its own line, and it has discontinued the sending of cars off its line for loading at mills on foreign roads. The car shortage has been practically continuous since the Presidential election, and still

continues, notwithstanding we have substantially increased our rolling stock."

Compton, Trans., Vol. I, p. 167.

Mr. Compton further said:

"In 1903 there was a business depression, and caution on the part of all railroad companies which caused them to think that it would be well to restrict the building of cars, as they did not know what the outcome would be. Immediately after 1903 business picked up again, and since that time the conditions in this country have been unprecedented in prosperity."

Compton, Trans., Vol. I, p. 173.

Mr. Bowes testified:

"The prices of lumber now range from $2.50 per thousand as a minimum to $10 per thousand as a maximum over the prices that obtained in 1903, at the time the advance in lumber rates took place."

Bowes, Trans., Vol. I, p. 132.

"It is today and has been for some time a question of the ability of the lumber manufacturers and shippers to supply the demand."

Bowes, Trans., Vol. I, p. 132.

Mills in Eastern Louisiana and in Mississippi are 40 to 60 days behind with their orders at present.

Enochs, Trans., Vol. I, p. 175.

Mr. Hale testified:

"Since February, 1904, the price of lumber has increased 50 or 60 per cent."

Hale, Trans., Vol. I, p. 208.

That the lumber business has been thriving is manifested by continual applications to the Gulf & Ship Island Railroad for tracks and sidings into new mill sites.

Hale, Trans., Vol. I, p. 208.

XLVI.

The Movement of Lumber to Points on and North of the Ohio River has Increased.

One of the principal claims of the complainants before the Commission was that the advance of 2 cents per hundred pounds had restricted and would continue to restrict the movement of yellow pine lumber to the markets on and north of the Ohio River. The statistics of movement, however, which were filed as exhibits to the depositions in the Circuit Court entirely disprove said claim.

The movement of yellow pine lumber via L. & N. R. R. from producing points south of Birmingham to Ohio River points and beyond has been as follows:

1903.....379,944,307 pounds
1904.....384,472,395 pounds
1905.....535,693,119 pounds

Compton, Exhibit No. 3, Trans., Vol. I, pp. 309, 310.

The movement of yellow pine lumber via the Illinois Central Railroad, through Cairo and Mounds, Ill., from points in Alabama, Florida, Georgia, Louisiana (east of the Mississippi River) and Mississsippi has been as follows:

1902.....18,269 cars
1903.....20,540 cars
1904.....16,587 cars
1905.....22,028 cars

Bowes, Exhibit C, Trans., Vol. II, pp. 850, 851.
Bowes, Exhibit C-1, Trans., Vol. I, pp. 284, 285.

Mr. Green's Exhibit No. 3 shows that the movement of lumber via the Southern Railway from Georgia and Florida, and also from Alabama, Mississippi and Eastern Louisiana to points on and north of the Ohio River, January to October inclusive, years 1902, 1903, 1904 and 1905 has been as follows:

1902:.....8,027 cars
1903.....9,743 cars
1904.....6,666 cars
1905.....9,889 cars

Green, Ex. No. 3, Trans., Vol. I, pp. 327, 328.

The movement of lumber via the M. & O. R. R. to Ohio River points and beyond has been as follows:

1902.....528,167 tons
1903.....531,211 tons
1904.....462,108 tons
1905.....537,118 tons

Miller, Trans., Vol. I, p. 153.

Mr. Steele filed as Exhibit No. 1 to his deposition a statement showing the movement of lumber from N. O. & N. E. R. R. stations in Mississippi to points in Central Freight Association territory. Said statement shows as follows:

1902	12,443 cars
1903	12,428 cars
1904	9,910 cars
1905	12,987 cars

Mr. Steele explains that the movement during the last three months of 1905 would have been at least 2,000 cars greater had the N. O. & N. E. R. R. been able to furnish the equipment.

Steele, Ex. 1, Trans., Vol. I, pp. 348, 349, 262.

The decrease in movement from Alabama & Vicksburg stations shown by Steele's Ex. No. 1 is explained by the fact that the lumber on said road has been nearly exhausted.

Steele, Trans., Vol. I, p. 262.

The marvelous increase in the amount of lumber exported through the port of Gulfport would indicate that there may have been a diversion to that port of at least a part of the lumber which would ordinarily have moved from Mississippi territory to markets on and north of the Ohio River.

Mr. Hale, Second Vice President of the Gulf & Ship Island Railroad, testifies that 20 to 22 per cent of the lumber produced on said road moves through Gulfport for export and for coastwise trade.

Hale, Trans., Vol. I, p. 216.

He testifies that up to date the harbor at Gulfport has cost the Gulf & Ship Island Railroad in the neighborhood of $2,000,000.

Hale, Trans., Vol. I, p. 216.

He thus explains the purpose of the construction of the harbor at Gulfport:

"The harbor at Gulfport was constructed by the Gulf & Ship Island Railroad for the purpose of enabling the mill men on that line to reach the coastwise markets and the markets of the world. Also to strengthen the position of the Gulf & Ship Island Railroad in the event that the markets in the interior of the United States were depressed on account of panic or failure of crops. The mill men on the Gulf & Ship Island Railroad have the advantage of shipping to South America, to Europe, Africa and to all points of the world."

Hale, Trans., Vol. I, pp. 215, 216.

The movement through Gulfport, including lumber produced on the Gulf & Ship Island Railroad and that which comes to the port of Gulfport by water, has been as follows:

1902...	13,044,237 feet..	(About)	1,000 cars
1903...	47,232,765 feet..	(About)	3,500 cars
1904...193,275,500 feet..		(About)	15,000 cars
1905...225,990,750 feet..		(About)	17,000 cars

Hale, Trans., Vol. I, p. 209.

XLVII.

The Price of Lumber Has Materially Advanced Since the Testimony Before the Commission was Taken.

The increase complained of in this case took effect on April 15, 1903.

It is shown by Mr. Compton's Exhibit No. 4, Trans., Vol. I., pp. 311, 319, 321, that during the second quarter of 1903, the price of Grade "A" on the Chicago market was $19.00-$20.00; that during the fourth quarter of 1905, the price of Grade "A" on the Chicago market had risen to $28.00-$34.00, an increase of 58.9 per cent.

It is shown by said Exhibit No. 4, that during the second quarter of 1903, the price of Grade "B" on the Chicago market was $17.50-$18.50; that during the fourth quarter of 1905, the price of Grade "B" on the Chicago market had risen to $21.00-$26.00, an increase of 35.5 per cent.

It is shown by said Exhibit No. 4, that during the second quarter of 1903, the price of Grade "C" on the Chicago market was $19.50-$21.00; that during the fourth quarter of 1905, the price of Grade "C" on the Chicago market had risen to $23.00-$24.50, an increase of 17.2 per cent.

The average increase on Grades "A," "B" and "C" during the fourth quarter of 1905 over the second quarter of 1903 was 35.5 per cent.

The prices of Grades "A," "B" and "C" in Chicago dur-

ing the third quarter of 1905 were the same as the prices of said grades during the fourth quarter of 1905; and the average price of all three grades during said quarter was $24.00-$28.00.

Mr. Compton's Exhibit No. 4 shows the Chicago prices of yellow pine lumber from January 1, 1891, to December 31, 1905, and said average price of $24.00-$28.00 during the third and fourth quarters of 1905 is materially higher than the price of any one of the particular grades at any time during said entire period of fifteen years.

Mr. Green's Exhibit No. 2 shows that the average advance in price of yellow pine lumber at points which take a rate of 23 cents per hundred pounds has been since February, 1904, on 22 different grades $6.08 per thousand feet, or 32 per cent.

Green, Exhibit No. 2, Trans., Vol. I, pp. 324, 325.

Mr. Green files as exhibit No. 4 a statement which contains a comparison of prices of yellow pine lumber at points on and north of the Ohio River in February, 1898, with a freight rate of 22 cents, with the prices prevailing in February 1906, with a freight rate of 23 cents; the purpose of said comparison being to show that although the difference in freight rate represents not exceeding 45 cents per thousand feet of lumber, the difference in prices far exceeds said figure.

Said statement shows increases in the prices of various grades of yellow pine lumber ranging from $5.25 per thousand feet to $22 per thousand feet.

Green, Exhibit No. 4, Trans., Vol. I, pp. 329, 252.

See also Compton's Exhibits Nos. 1 and 2, showing increase in prices of various grades of lumber in the Montgomery, Ala., market and in the Nashville, Tenn., market; also Green's Ex. No. 6 showing the increase in prices of various grades of lumber in the Atlanta, Ga., market.

Compton, Exhibits Nos. 1 and 2, Trans., Vol. I, pp. 287-308.

Green, Exhibit No. 6, Trans., Vol. I, p. 332.

XLVIII.

There Has Been a Marked Increase in the Price of Lumber Purchased by Railroad Companies for Their Own Use Since the Testimony Before the Commission Was Concluded.

Mr. Green thus sets forth the conditions as regards the Southern Railway:

"The prices for yellow pine lumber used by the Southern Railway are substantially higher now than in February, 1904; indeed, they are higher now than ever heretofore. The average cost of pine lumber purchased by the Southern Railway for the six months, July to December inclusive, 1904, was $12.83 per thousand feet. For the corresponding period of 1905, the average cost was $16,52 per thousand feet, an increase of $3.69 per thousand feet, or 28.8 per cent. The total cost to the Southern Railway of yellow pine lumber purchased during the last half of 1905 was $290,179.83. The same lumber purchased at the average price paid during the same period in 1904 would have cost $225,290.44, an increase in the expense of operation to the Southern Railway in the item of pine lumber

alone of $64,889.39 for six months, or $129,778.78 per annum. The average price paid by the Southern Railway for yellow pine lumber for the six months, July to December inclusive, 1904, was $12.83 per thousand feet. The average price paid during December, 1905, was $18.06 per thousand feet. The prices paid now are not less than in December, 1905. Therefore the present price represents an increase of not less than $5.23 per thousand feeet, or 40.8 per cent as compared with the last half of 1904. The future purchases by the Southern Railway of yellow pine lumber will not be in less proportions than heretofore. The purchases for the six months ending with December, 1905, amounted to 17,559,660 feet, which, at an increase of $5.23 per thousand feet, based on present prices, would cost $128,370.22 more than at the average cost per thousand feet which was paid during the last half of 1904; in other words, on the basis of present prices, the operating expense of the Southern Railway, in the item of yellow pine lumber alone, is increased $256,740.44 per annum by the increase in the price of yellow pine which it now has to pay as compared with the average price paid in the last half of 1904. These figures, however, do not fully represent the enormous increases that have taken place in the prices of yellow pine lumber during recent years. The average price paid by the Southern Railway for yellow pine lumber in the calendar year:

1898.....was $ 9.70 per thousand feet
1899.....was 10.43 per thousand feet
1900.....was 11.71 per thousand feet
1901.....was 12.13 per thousand feet
1902.....was 13.64 per thousand feet

"The average price in December, 1905, was $18.06 per thousand feet. It is not less at this time. This represents

an increase over the average price paid in 1898 of $8.36 per thousand feet, or 86.2 per cent. And this increase applied to the purchases during the last half of 1905 would have represented an increased cost to the Southern Railway for its yellow pine lumber of $147,798.75, or $295,597.50 per annum, which is not an exaggerated statement of the present and future increased cost of operation to the Southern Railway for its pine lumber alone."

Green, Trans., Vol. I, pp. 250, 251, 252.

Mr. Compton filed as Exhibit No. 5 to his deposition a statement showing the price of yellow pine lumber, intermediate and large sills, purchased by the Louisville & Nashville Railroad Company during the years 1900, 1901, 1902, 1903, 1904 and 1905.

The price of intermediate sills had risen from $13 in January, 1900, to $17 in December, 1905.

The price of large sills had risen from $14 in January, 1900, to $22 in December, 1905.

Compton, Exhibit No. 5, Trans., Vol. I, p. 322.

The Louisville & Nashville Railroad purchased of these grades about 4,000,000 feet per annum.

Compton, Trans., Vol. I, p. 171.

Since February, 1904, the L. & N. R. R. Co. has built and bought material for 8,000 freight cars at an increased cost of not less than $400,000 over what such material would have cost in February, 1904.

Compton, Trans., Vol. I, p. 172.

The prices of lumber purchased by the L. & N. R. R. Co.

in 1905 exceeded the prices paid for similar grades purchased by said company in 1903 by about 10 per cent.

Compton, Trans., Vol. I, p. 173.

Since 1903 there has been an increase in cost to the Illinois Central Railroad for lumber purchased by it of 15 per cent.

Bowes, Trans., Vol. I, p. 131.

Notwithstanding the great increase in the price of lumber the construction of cars continues.

Mr. Miller testifies that since February, 1904, the Mobile & Ohio Railroad Company has purchased of various kinds of freight cars 2,850; that it has built at its own shops 50 gondolas; and that it has placed orders for 1,200 cars consisting of box cars, furniture cars and gondola cars, which have not yet been delivered. Total 4,100 cars.

Miller, Trans., Vol. I, p. 155.

Mr. Bowes testifies that the Illinois Central since 1903 has constructed or purchased 3,815 cars in 1904, and 2,519 cars in 1905.

Bowes, Trans., Vol. I, p. 150.

The average increase in prices paid for lumber purchased by the N. O. & N. E. R. R. in February, 1906, over the prices of February, 1904, was $5.78 per thousand feet; percentage of increase 50.6 per cent.

Exhibit A A, Steele, Trans., Vol. I, p. 378.

XLIX.

In Addition to the Increase in Cost of Lumber There Has, Since 1903, Been a Marked Increase in Cost of Operating Railroads in Other Respects.

Since 1903 there has been an increase in the prices of material purchased by the I. C. R. R. Co. as follows:

Coal.....10 per cent increase
Locomotives..... 3 per cent increase
Box cars.....14 per cent increase
Coal cars.....27 per cent increase
Flat cars.....25 per cent increase
Bowes, Trans., Vol. I, p. 131.

On the I. C. R. R. there has also been an increase in the wages of employes, such as engineers, firemen, brakemen, switchmen, trackmen and others of approximately $1,200,000 per annum, or about 8 per cent.
Bowes, Trans., Vol. I, p. 131.

The increase in expenses of the I. C. R. R. on account of increase in cost of material, equipment and wages, has been approximately 10 per cent.
Bowes, Trans., Vol. I, pp. 131, 132.

There has been a radical advance in the price of material used in maintaining and operating railroads, probably 40 per cent, which would be represented by a corresponding increase in the cost of operation of about 10 per cent.
Miller, Trans., Vol. I, p. 165.